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CASES

Administrative Law. *Town of Richmond v. R.I. Dept. of Envtl. Mgmt.*, 941 A.2d 151 (R.I. 2008). The Rhode Island Supreme Court determined that under the administrative regulations of the Rhode Island Department of Environmental Management (RIDEM), the superior court has subject matter jurisdiction to grant a town declaratory relief under both the Administrative Procedures Act (the APA) and the Uniform Declaratory Judgments Act (the UDJA). However, when a town acts as an intervenor in administrative enforcement proceedings, it lacks any right to prevent an agency and a third party manufacturer from reaching a negotiated consent agreement. Because RIDEM was created under the State's legislative powers, the Court will be deferential when interpreting RIDEM's administrative statutes, thus allowing the agency discretion to create informal proceedings for matters within its jurisdiction.

FACTS AND TRAVEL

This dispute arises out of an incident in which RIDEM served a Notice of Violation (NOV) in August of 2004 on Charbert, Inc. (Charbert), a textile manufacturing and fabric-dyeing business which operated in the Town of Richmond.[1] The NOV, which alleged numerous RIDEM administrative violations, ordered Charbert to comply with the applicable regulations and to pay a penalty of $9,500.[2] Pursuant to RIDEM's Administrative Adjudication Division (AAD), Charbert requested a hearing to address the NOV.[3] Thereafter, the Town of Richmond (Richmond or the town) moved to intervene.[4]

The hearing officer granted intervenor status to Richmond

1. *See* Town of Richmond v. R.I. Dept. of Envtl. Mgmt., 941 A.2d 151, 153 (R.I. 2008); *see also id.* at n.1 (Charbert, Inc. was the prior owner of the subject property during the relevant period for this inquiry. It transferred its interests to Alton Realty Corp. in 1991, but continued operating the textile manufacturing facility in Richmond until February 2008).

2. *Id.* at 153.

3. *Id.*

4. *Id.* (Richmond argues that RIDEM has failed in the past to protect the town's rights and interests).

because the town established that its interests were not adequately represented in the hearing and that it suffered an injury in fact.[5] Consequently, the town issued discovery requests to the other parties, and when the parties did not comply, the town moved to compel the production of discovery documents.[6] While the town's motion was pending, RIDEM and Charbert negotiated an informal disposition of the NOV – a proposed consent agreement, which was received by the town on June 29, 2005.[7]

In a transaction that seems like a slight-of-hand, the town received the proposed copy on the same day that Charbert signed the final copy.[8] However, the consent agreement itself did not become final until July 5, 2005.[9] Two days after the consent agreement was finalized, Richmond filed an objection with the hearing officer; however, before the officer could resolve the objection, Charbert withdrew its original request for the NOV hearing on July 11, 2005.[10] Therefore, pursuant to RIDEM's AAD regulations, the proceeding closed, thus cancelling Richmond's motions to compel discovery.[11]

Because the proceedings concluded, Richmond filed a new and independent complaint against RIDEM in Superior Court on July 22, 2005, requesting judicial review of RIDEM's actions under the APA, and declaratory relief under the UDJA.[12] The complaint alleged that in the past RIDEM's enforcement efforts against manufacturers had been ineffective, and that noxious odors and contamination of groundwater and soil resulted, causing a threat to the health and welfare of Richmond's residents.[13] On August 31, 2005, Charbert's motion to intervene in the town's case was granted.[14]

At the trial level, the Superior Court held that because the town could intervene in the administrative hearing, it became a

5. *Id.*
6. *Id.*
7. *Id; see also id.* at n.4.
8. *Id.* at n. 4
9. *Id.* at n.4.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 153-154.
14. *Id.* at 154.

full party to the proceedings.[15] As such, RIDEM and Charbert could not exclude the town from the final resolution of the dispute, and any attempt to do so would nullify the disposition.[16] On the separate jurisdictional issue, the Superior Court held that it could grant declaratory relief to the town under both the APA and the UDJA.[17] Thus, the trial justice ordered that the town be permitted to participate in the hearing and that the consent agreement between RIDEM and Charbert be set aside.[18]

Both defendants appealed the decision to the Supreme Court, arguing that the Superior Court improperly interfered with RIDEM's statutory authority to resolve matters within its jurisdiction.[19] The Supreme Court affirmed the holding that the Superior Court had subject matter jurisdiction over the town's declaratory relief claim.[20] However, the Supreme Court ultimately vacated the lower court's order, stating the lower court could not nullify a consent agreement because the intervenor (the town) did not participate in the negotiations.[21]

ANALYSIS AND HOLDING

In deciding whether a town has standing to raise a declaratory relief claim against an agency and a third party, the Court relied on R.I. GEN. LAWS §42-35-7 (1956).[22] Generally, a party must exhaust all administrative remedies before seeking judicial review; however, the party may seek declaratory relief if the administrative regulation in question interferes with that party's rights.[23] Thus, the Rhode Island Supreme Court affirmed the trial justice's finding that the Superior Court was vested with subject matter jurisdiction to grant declaratory relief.[24]

According to the AAD's rules, an intervenor may become a full party to a hearing.[25] Thus, the Court acknowledged that under

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 154-55.
20. *Id.* at 156.
21. *Id.* at 158.
22. *Id.* at 156.
23. *Id.*
24. *Id.*
25. *Id.*

these rules, the hearing officer properly permitted the town to intervene.[26] However, the AAD's rules further provide that only a petitioner may withdraw his request.[27] Therefore, once Charbert (the petitioner) effectively withdrew its request for a hearing, the town did not have an independent right to a hearing.[28] Consequently, because Charbert terminated the administrative proceeding, Richmond was entitled to bring a separate suit against RIDEM and Charbert in Superior Court because it was not a party to the consent agreement between those parties.[29]

In contrast with the AAD's rules, the RIDEM's Rules and Regulations for Assessment of Administrative Penalties (AAP) do not give an intervenor the right to a hearing.[30] However, under the AAP, the director of an agency has broad authority to resolve enforcement proceedings through informal dispositions because the Court defers to the administrative agency in enforcement actions that the legislature entrust to the agency.[31] Thus, the Court held that the director did not have to seek approval from the intervenor (the town) before entering into a consent agreement.[32] In other words, pursuant to RIDEM's AAP Rules, the town had no control over the result of the informal negotiations between RIDEM and Charbert.[33]

COMMENTARY

Although the Supreme Court unanimously vacated the Superior Court's order which set aside the consent agreement and remanded the hearing back to the AAP, Justice Goldberg did not refrain from chastising RIDEM on its operating practices in these dealings. Justice Goldberg, in maternal fashion, seems to suggest that an agency will get one warning; one free opportunity where "grossly inappropriate" behavior and weak legal reasoning will suffice in the Supreme Court. Consequently, the Court provides an ultimatum: "henceforth the agency will act with greater respect

26. *Id.* at 157.
27. *Id.* at 156.
28. *Id.* at 157
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id*

in its dealings with local officials."[34]

In reference to the "slight-of-hand" maneuver by RIDEM, in which RIDEM presented a proposed copy of the consent agreement to the town on the same day that the agreement between RIDEM and Charbert was finalized, Justice Goldberg stated, "we do not condone the ham-handed treatment of a town by this state agency."[35] Furthermore, she further likens RIDEM's "grossly inappropriate" behavior to a phrase in Hamlet's famous soliloquy: "[t]he insolence of office."[36] By doing so, Justice Goldberg refers to the fact that, in this instance, RIDEM has overstepped its authority by encroaching on a state municipality and "such behavior is not what we expect of any state agency."[37]

Likewise, Justice Goldberg and the Rhode Island Supreme Court do not fail to chastise RIDEM for its weak arguments that the town had no standing in the courts and that Richmond was confined to relief provided by R.I. GEN. LAWS §42-35-15 (1956).[38] In fact, the Court notes "there was no final agency decision in this case and therefore, nothing for the trial justice to review on a nonexistent record. The argument by DEM that Richmond's right to relief was confined to the provisions of R.I. GEN. LAWS §42-35-15 (1956) is *bewildering*; we are *hard-pressed* to fathom just what DEM would have the Superior Court review."[39]

Consequently, although the law permitted the Court to find for RIDEM and Charbert, it made itself clear that in the future, agencies (and in particular RIDEM) must act with sufficient respect towards the municipalities of Rhode Island.

CONCLUSION

In *Town of Richmond v. Rhode Island Department of Environmental Management*, the Rhode Island Supreme Court vacated the Superior Court order to set aside the consent agreement between RIDEM and Charbert regarding the disposition of the NOV. In so doing, the Court noted "an administrative agency will be accorded great deference in

34. *Id.* at 158.
35. *Id.*
36. *Id.* (citing WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1)
37. *Id.*
38. *Id.* at 155.
39. *Id.* at 156 (emphasis added).

interpreting a statute whose administration and enforcement have been entrusted to the agency."[40]

Jessica L. Grimes

40. *Id.* at 157 (citing Murray v. McWalters, 868 A.2d 659, 662 (R.I. 2005)).

Civil Procedure. *Allen v. South County Hospital et al.*, 945 A.2d 289 (R.I. 2008). The trial court dismissed plaintiff's case for lack of prosecution, and, on appeal, granted a motion to vacate the previous dismissal subject to certain conditions. The plaintiff then appealed the motion to vacate based on the alleged inequity of the court ordered conditions. The Rhode Island Supreme Court found that the conditions which held plaintiff responsible for defendants' costs and fees in connection with trial, as well as a $60,000 surety bond, were inequitable and thus an abuse of discretion.

FACTS AND TRAVEL

The plaintiff, Maridel Allen ("Allen"), had spent over four years conducting vigorous discovery in a medical negligence and wrongful death action, as the statutory beneficiary of her mother, in preparation for a trial date of May 16, 2005.[1] Allen had built her case around the expert opinion of Aaron B. Waxman, M.D. ("Dr. Waxman"), who was scheduled to testify at trial for Allen.[2]

Allen's litigation related problems with Dr. Waxman began on May 8, 2005 when Dr. Waxman told Allen he would be unable to testify on the scheduled trial date.[3] Allen filed a motion for a continuance, and, after some deliberation by the trial justice, a new trial date was set for November 28, 2005.[4] Thereafter, Dr. Waxman contacted Allen through e-mail a month before the newly scheduled trial date to inform Allen he was no longer willing to serve as her expert witness.[5] After various futile attempts to contact Dr. Waxman, Allen began searching for a new expert witness.[6]

Allen filed a motion to vacate the November 28, 2005 trial date and also filed a motion for a continuance, both of which were

1. Allen v. South County Hospital et al., 945 A.2d 289, 291 (R.I. 2008).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

denied by the trial court.[7] On November 28, 2005, Allen again moved for a continuance based on the fact that Paul Mayo, M.D. ("Dr. Mayo") was tentatively going to be her new expert witness.[8] Since Allen could not continue at trial without an expert witness, and Dr. Mayo's commitment to Allen as her new expert witness was speculative, the trial justice dismissed the case for lack of prosecution under Rhode Island Superior Court Rule of Civil Procedure Rule 41(b)(1).[9] As such, on December 2, 2005, the trial justice dismissed the case with prejudice.[10]

Shortly thereafter, Allen filed a motion to vacate the dismissal under Rhode Island Superior Court Rule of Civil Procedure Rule 60(b)(6), arguing relief from the judgment of dismissal was equitable in light of the circumstances.[11] After all parties submitted estimates for the cost of deposing Dr. Mayo, who had agreed to be Allen's expert witness, the trial justice granted Allen's motion to vacate subject to certain conditions.[12] Among these conditions were Allen's responsibility to pay defendants' "reasonable" costs and attorneys' fees incurred because of the motion to vacate, trial preparation costs, and a corporate surety bond of $60,000, as a security for each of the three defendants' anticipated expenses.[13] If Allen did not comply with the conditions by January 3, 2006, the motion to vacate would be denied, and the dismissal would remain final.[14]

After Allen told the trial court she did not have the financial means to comply with the various conditions of the order, judgment was entered denying Allen's motion to vacate.[15] Allen then appealed to the Rhode Island Supreme Court, claiming that it was an abuse of discretion for the trial court to dismiss her complaint for lack of prosecution under 41(b)(1), and for imposing various pre-conditions to her motion to vacate judgment.[16] The defendants cross appealed, claiming that the trial justice abused

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 292.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

his discretion by granting Allen's motion to vacate.[17]

ANALYSIS AND HOLDING

The primary question the Rhode Island Supreme Court had to determine was whether the conditions imposed by the trial court on Allen's motion to vacate were unfair or unduly burdensome.[18] Rhode Island Superior Court Rule of Civil Procedure Rule 60(b) provides in relevant part, "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding, for any other reason justifying relief from the operation of the judgment."[19] Applying an "abuse of discretion" standard to the motion to vacate, the Court concluded the $60,000 surety bond, as well as the order requiring that Allen be responsible for "all reasonable costs and attorneys' fees incurred with respect to trial preparation," were both an abuse of discretion and were thus stricken.[20]

The Court used federal case law to analyze Rule 60(b) motions in general, to determine when court ordered conditions should be considered so inequitable as to be set aside.[21] In *Diehl v. H.J. Heinz Co.*, the Seventh Circuit found that a condition is unreasonable if the condition can not be complied with.[22] In that case, the court held it was an unreasonable condition to require a plaintiff's signature within one day where the distance involved in travel would render the condition virtually impossible.[23] In *Thorpe v. Thorpe*, the D.C. Circuit Court held that if a party is unable to comply with a court-imposed condition, questions relating to due process of law are raised.[24] In that case, the court held that a condition was unreasonable where the court required the defendant to place a large amount of money in plaintiff's bank account, twice the amount awarded in the original default

17. *Id.*
18. *Id.*
19. R.I. SUPER. CIV. P. 60(b).
20. *Id.* at 295-296 (citing Keystone Elevator Co. v. Johnson & Wales Univ., 850 A.2d 912, 916 (R.I. 1999)).
21. *See id.* at 293.
22. *Id.* (citing Diehl v. H.J. Heinz Co., 901 F.2d 73, 74 (7th Cir. 1990)).
23. *Id.*
24. *Id.* at 294 (citing Thorpe v. Thorpe, 364 F.2d 692, 694 (D.C.Cir. 1996)).

judgment.[25]

Here, the first condition that the Court held inequitable was the requirement that Allen pay "all reasonable costs and attorneys' fees incurred with respect to trial preparation."[26] The Court believed that although the trial judge may have had good intentions, the language of this condition was overly broad, and defendants could therefore include a multitude of trial expenses that would have been necessary even if trial had proceeded at the earlier scheduled date.[27]

The second condition that the Court determined was inequitable was the requirement that Allen post a $60,000 surety bond, despite Allen's alleged financial inability to do so. [28] Allen argued it was unjust for the trial court to demand such as large sum of money, as she had already invested years of time and money into the case, as well as the additional costs of obtaining a new expert witness.[29] The trial judge had stated that a motion to vacate could be granted under Rule 60(b) "upon terms that are just", and had acknowledged that Dr. Waxman abandoning Allen at the last minute was an "extraordinary circumstance" beyond her control.[30]

Although the judge determined that the costs to each of the three defendants would be approximately $20,000 each, he did not take into account Allen's inability to raise this amount of money.[31] Therefore, if Allen could not raise $60,000, practically speaking, the court ordered "condition" amounted to a flat-out denial of Allen's motion to vacate.[32] This denial of Allen's right to a trial on the merits, by conditioning her trial on an "impossible" financial obligation, raised questions of Due Process, and therefore amounted to an abuse of discretion by the trial judge.[33]

The Court dismissed defendant's cross-appeal alleging there were no extraordinary circumstances that would warrant

25. *Id.* at 293.
26. *Id.* at 294.
27. *Id.*at 295.
28. *Id.*
29. *Id.*
30. *Id.* at 296.
31. *Id.*
32. *Id.*
33. *Id.*

dismissal under 60(b)(6).[34] The Court determined that although the motion to vacate was interlocutory and not appealable, Allen's loss of Dr. Waxman at the last minute was indeed an extraordinary circumstance.[35]

Finally, the Court affirmed the trial court's original dismissal under 41(b)(1) for lack of prosecution.[36] The original judgment was affirmed due to the fact the Court was evenly divided on this issue, and therefore could not reach the conclusion that the original judgment was an abuse of discretion.[37] Consequently, the Court affirmed the trial court's December 2, 2005 dismissal of the case for lack of prosecution, but affirmed the judgment vacating that order subject to the Court's newly modified conditions.[38]

COMMENTARY

The Rhode Island Supreme Court effectively held that constitutional commitments to issues such as Due Process should be a primary consideration when a Court exercises it independent judgment in fashioning conditions to any judicial order. By imposing a court ordered condition that is overly burdensome on either plaintiff or defendant, the court is essentially denying that individual a right to a fair trial. Although one party may be legally responsible for causing the other party to incur additional fees and costs due to delayed litigation, an equitable solution for both parties needs to be fashioned. This is particularly important due to the hefty financial burden on any party in on-going litigation. Most citizens have limits to what they can realistically afford in litigation, and a court should be mindful of this practical reality. This calls for a court to conduct a reasonable investigation into the financial capacities of both parties, and fashion a remedy that is consistent with the abilities and needs of each.

Although the Court stuck down two conditions of the Superior Court's previous ruling, it affirmed all other conditions, including reasonable costs expended to investigate and depose Dr. Mayo.[39] This only makes sense is light of fairness to the defendants, who

34. *Id.*
35. *Id.* at 297.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

should not have to incur additional expenses by no fault of their own. As such, although a plaintiff's financial capabilities should be a main concern of the Court when creating monetary conditions, the Court also needs to consider equity to the party who is not at fault. Therefore, it is important that if a court is going to prolong litigation for the benefit of one party, the other party should not have to incur additional expenses without being compensated. Consequently, while the Court's opinion allows a broad range of discretion to fashion what it considers to be an "equitable" condition on any motion, this discretion does not come without limits.

CONCLUSION

The Court held that a condition requiring plaintiff to be responsible for defendants' costs and fees relating to trial preparation, and a condition requiring plaintiff to pay a $60,000 bond, were both inequitable under Rule 60(b). The Court held that relief from prior judgment is appropriate where the plaintiff is financially incapable of complying with court ordered conditions. Accordingly, the Rhode Island Supreme Court modified a prior order of the trial court, striking two conditions of the trial court's motion to vacate, on the ground that the conditions were inequitable and thus an abuse of discretion.

Kristen M. Hermiz

Civil Procedure. *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171 (R.I. 2008). Rhode Island joined the vast majority of states in formally recognizing the doctrine of *forum non conveniens*. Under this doctrine, a court may use its discretion to dismiss a case, even when jurisdiction and venue are technically proper, in two instances; first, where the chosen forum is oppressive and vexatious to the defendant; second, where considerations affecting the chosen court's own administrative and legal problems militate in favor of dismissal.

FACTS AND TRAVEL

The plaintiffs in this case are all Canadian residents who filed 39 cases in Rhode Island Superior Court alleging personal injury and wrongful death, all caused by workplace exposure to products containing asbestos.[1] All relevant instances of employment, exposure, injury and treatment took place in Canada.[2] While all the corporate defendants do business in Rhode Island, the only two corporate defendants with principal places of business in Rhode Island were dismissed before the instant appeal was filed.[3] None of the remaining corporate defendants have their principal place of business in Rhode Island, and none of them are incorporated in Rhode Island.[4]

On October 27, 2004, one of the defendants, General Electric, filed a motion to dismiss on *forum non conveniens* grounds; the other defendants joined in this motion.[5] On May 27, 2005, the motion was denied by the Superior Court.[6] The trial judge first found that venue and jurisdiction were both proper, and went on to say that there were no practical problems with trying the case in Rhode Island.[7]

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1. Kedy v. A.W. Chesterton Co., 946 A.2d 1171, 1175-1176 (R.I. 2008).
2. *Id.* at 1176.
3. *Id.* at 1176 n.3.
4. *Id.* at 1176.
5. *Id.*
6. *Id.*
7. *Id* at 1176-1177.

The only official recognition of the doctrine of *forum non conveniens* had been from the Rhode Island General Assembly, having formally adopted the doctrine solely for child custody cases under the Uniform Child Custody Jurisdiction Act (UCCJA) in 1978.[8] Since the issue of *forum non conveniens* had not otherwise been recognized in Rhode Island by the Legislature or the Supreme Court, the trial judge denied the motion to dismiss.[9] Defendants appealed to the Rhode Island Supreme Court, raising two issues; first, should the Supreme Court expressly recognize the doctrine of *forum non conveniens* and set standards for its application;[10] second, if the doctrine is recognized, should it apply to this case and result in dismissal?[11]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court first pointed out that the Court is free to review questions of law and to overturn existing precedents to create new ones.[12] Such questions of law are reviewed *de novo*.[13] The Supreme Court took the case to settle the question of the applicability of *forum non conveniens*, because Rhode Island trial courts have split on the issue.[14]

The Applicability of Forum Non Conveniens

"The doctrine of *forum non conveniens* is 'an equitable principle by which a court having jurisdiction may decline to exercise it on considerations of convenience, efficiency, and justice.'"[15] A court may invoke the doctrine without statutory authority,[16] as *forum non conveniens* is part of the courts' inherent judicial powers, necessary for effective and efficient judicial administration.[17]

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8. *Id.* at 1176.
9. *Id.*
10. *Id.* at 1177.
11. *Id.*
12. *Id.* (quoting Hometown Props., Inc. v. Rhode Island Dept. of Envtl. Mgmt., 596 A.2d 841, 843 (R.I. 1991)).
13. *See id.*
14. *See id.*
15. *Id.* at 1178 (quoting AT & T Corp. v. Sigala, 274 Ga. 137, 139 (2001)).
16. *Id.*
17. *Id.* (quoting Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 COLUM. L.REV. 1 (1929)).

The United States Supreme Court stated that *forum non conveniens* means that "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[18] "The principle allows a court to decline to exercise jurisdiction when the plaintiff's chosen forum is significantly inconvenient and the ends of justice would be better served if the action were brought and tried in another forum."[19]

Plaintiffs argued that *forum non conveniens* is a flawed doctrine leading to confusion and inconsistencies between federal and state courts,[20] and that the General Assembly was the appropriate body to enact the doctrine.[21] Plaintiffs further contended that the General Assembly's intent to *not* adopt the doctrine universally was evinced by their choice to adopt it solely for child custody cases.[22]

Defendants disagreed with plaintiffs' contention that the doctrine is applied inconsistently between state and federal courts.[23] Rather, they argued that *forum non conveniens* is part of the court's inherent power to prevent "injurious and unnecessary forum choices by plaintiffs."[24] Agreeing with the defendants, the Rhode Island Supreme Court formally adopted the doctrine of *forum non conveniens*, and then set to the task of setting standards for its application.[25]

The Court took great pains to emphasize the policy rationale behind *forum non conveniens*,[26] reiterating that it is founded in "fundamental fairness."[27] Independent of statutory grant, this inherent judicial power is "necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[28] As for the plaintiffs' argument that the Gen-

18. *Id.* (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947)).
19. *Id.* (citing Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 947 (1st Cir. 1991)).
20. *Id.* at 1179.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* (quoting Adkins v. Chicago, Rock Island and Pacific R.R. Co., 54 Ill.2d 511, 514 (1973)).
28. *Id.* at 1180 (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962)).

eral Assembly's adoption of *forum non conveniens* in child custody cases precludes its application elsewhere, the Supreme Court cited persuasive authority that "[a]lthough specific statutes codifying the doctrine will prevail over the common law, the absence of a statute generally permitting dismissal based on forum non conveniens does not prohibit us from adopting the doctrine. . ."[29]

The Legal Standard for Forum Non Conveniens

When considering modifications or additions to procedural rules, the Rhode Island Supreme Court looks to other jurisdictions whose rules are similarly modeled after the Federal Rules of Civil Procedure.[30] Thus, the Rhode Island Supreme Court held:

"[W]hen an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum would 'establish. . .oppressiveness and vexation to a defendant. . .out of proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,' the court may, in the exercise of its sound discretion, dismiss the case" on *forum non conveniens* grounds, "even if jurisdiction and proper venue are established."[31]

Before conducting a *forum non conveniens* analysis, a court must determine whether jurisdiction and venue are proper; a *forum non conveniens* inquiry cannot proceed where jurisdiction or venue are improper.[32] However, in keeping with the underlying policy of promoting judicial economy, the court may "dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant."[33]

The *forum non conveniens* analysis consists of two parts. First, the court must consider whether an alternative forum exists that is available to the parties and is adequate to resolve the con-

29. *Id.* at 1182 (quoting AT & T Corp. v. Sigala 549 S.E.2d 373, 377-378 (GA 2001)).

30. *Id.* (quoting Ciunci, Inc. v. Logan, 652 A.2d 961, 962 (R.I. 1995)).

31. *Id.* at 1182-83 (quoting American Dredging Co. v. Miller, 510 U.S. 443, 447-448 (1994)).

32. *Id.* at 1183 (citing Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 127 S.Ct. 1184, 1193 (2007)).

33. *Id.* (citing *Sinochem* 127 S.Ct. at 1192)).

tested issues.[34] Second, the court must weigh private- and public-interest factors to determine the relative inconvenience of continuing in the present forum.[35]

As to the first part of the analysis, for another forum to be 'available,' the defendant must be amenable to process in the alternative jurisdiction.[36] To ensure the availability of an alternative forum, a court can condition *forum non conveniens* dismissal on the defendant's consent to submit to jurisdiction in an alternative forum.[37] In assessing the adequacy of the alternative forum, the bar is quite low – an "alternative forum is adequate as long as the plaintiff will not be deprived of all remedies or subjected to unfair treatment."[38] An unfavorable change in law will only be considered when the potential remedy is so inadequate or unsatisfactory as to be no remedy at all.[39]

The second portion of the *forum non conveniens* analysis considers private- and public-interest factors to assess the inconvenience of continuing the suit in the chosen forum.[40] Private interest factors include:

". . .the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."[41]

Other considerations include the enforceability of a judgment in the alternative forum, and considerations regarding the availability of a fair trial.[42] Also, plaintiff's choice of forum may not be a weapon used to harass or oppress the defendant by adding unne-

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34. *Id.* (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22 (1981)).
35. *Id.* (citing *Piper Aircraft Co.*, 454 U.S. at 255)).
36. *Id.* (citing *Piper Aircraft Co.*, 454 U.S. at 255 n.22)).
37. *Id.* (citing Kinney Sys., Inc. v. Continental Ins. Co., 674 So.2d 86, 87 (Fla. 1996)).
38. *Id.* at 1184 (quoting CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3828.3 at 677-82 (3rd ed. 2007)).
39. *Id.* (quoting *Piper Aircraft Co.*, 454 U.S. at 247)).
40. *Id.*
41. *Id.* (quoting *Gulf Oil Corp.*, 330 U.S. at 508)).
42. *Id.* at 1184-85 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).

cessary trouble or expense to conducting a defense.[43]

A court considering a motion to dismiss on *forum non conveniens* grounds must consider public-interest factors as well,[44] including administrative difficulties regarding a crowded docket, how relevant the litigation is to the chosen jurisdiction, the local interest in having the case decided at home, the existence or lack of local law and the difficulties associated with applying extra-jurisdictional law, and the money and time spent in deciding a case more appropriately tied to another forum.[45] Further, "[a] trial court's decision to grant or deny a motion to dismiss on *forum non conveniens* grounds is reviewed under an abuse of discretion standard."[46]

Forum Non Conveniens Applied to the Present Case

The Rhode Island Supreme Court adopted the doctrine of *forum non conveniens* in the exercise of its supervisory powers.[47] Here, the plaintiffs admitted to seeking jurisdiction in Rhode Island rather than Canada because of Rhode Island's favorable discovery rules, and because the potential damage awards in Canada would not be as substantial as they would in be Rhode Island.[48] Since these are not valid bases for showing the inadequacy of an alternative forum, and since Canada has a legal system quite capable of fairly hearing and deciding the plaintiffs' case, the Court held that a Canadian forum would be adequate.[49] To ensure availability, dismissal was conditioned on defendants agreeing to waive any potential statute of limitations defenses in the Canadian forum.[50]

Further, the Supreme Court found that private-interest factors favored dismissal on *forum non conveniens* grounds.[51] All re-

43. *Id.*
44. *Id.* at 1185.
45. *Id.* (quoting *Gulf Oil Corp.*, 330 U.S. at 508-09)).
46. *Id.* at 1186.
47. *Id.* (citing Tanner v. Town Council of East Greenwich, 880 A.2d 784, 801 (R.I. 2005)).
48. *Id.* at 1186-87.
49. *Id.* at 1187.
50. *Id.*
51. *Id.* at 1188.

levant injuries and treatment occurred in Canada.[52] Further, all the plaintiffs are residents of Canada, and all of the parties involved had relatively tenuous ties to Rhode Island.[53] All of the witnesses and evidence were apparently located in Canada, and only Canadian courts could have properly compelled witnesses to appear.[54] Finally, most of the relevant parties (excluding the attorneys) would have had to travel from Canada to Rhode Island for a trial.[55]

The Supreme Court also found that public-interest factors favored dismissal.[56] A Rhode Island jury would have had to sit through a long and "complicated trial that literally ha[d] no connection to Rhode Island."[57] Further, Rhode Island judges and attorneys would likely have had to consider and apply Canadian law, adding an unnecessary layer of complexity to the trial.[58] The Court was unable to find a valid justification for the expenditure of judicial resources to hear such a case.[59] "[T]he central question which a court must answer when weighing the *public* interests in the outcome and administration of a case. . . is whether the case has a general nexus with the forum sufficient to justify the forum's commitment of judicial time and resources to it."[60] Here, the Court was unable to find any applicable nexus to Rhode Island.[61]

COMMENTARY

In an age where trials have become extremely expensive for all of the parties involved, and where courts' dockets are becoming ever more crowded, the Rhode Island Supreme Court has taken a common-sense approach to see to it that local courts are not overburdened with litigation that just does not belong here. The Court

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52. *Id.* at 1187.
53. *Id.*
54. *Id.* at 1187-88.
55. *Id.* at 1188.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1189.
60. *Id.* (quoting Kinney Sys., Inc. v. Continental Ins. Co., 647 So.2d 86, 87 (Fla. 1996)).
61. *Id.*

recognized that parties may seek to take unfair advantage of this state's relatively liberal discovery and/or damages rules. Rhode Island's failure to formally recognize *forum non conveniens* previously may have been motivated by a desire to help all injured parties find redress, regardless of their identity or the facts of their particular case, so long as the jurisdictional requirements were met. However, considerations of fundamental fairness and judicial economy have tempered this noble desire, resulting in the formal recognition of the doctrine of *forum non conveniens.*

CONCLUSION

Rhode Island has now formally recognized the doctrine of *forum non conveniens.*[62] Before considering a motion to dismiss for *forum non conveniens*, a court generally must ensure that jurisdiction and venue are proper.[63] From there, the analysis is two-pronged. First, the court must consider "whether an alternative forum exists that is both available and adequate to resolve the disputed legal issues."[64] Second, the court must "determine the inconvenience of continuing in the plaintiff's chosen forum by weighing private- and public-interest factors."[65]

Arthur DeFelice

62. *Id.* at 1179.
63. *Id.* at 1183.
64. *Id.* (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22 (1981)).
65. *Id.* at 1183 (citing *Piper Aircraft Co.*, 454 U.S. at 255)).

Civil Procedure. *Ryan, et al. v. Roman Catholic Bishop of Providence, et al.*, 941 A.2d 174 (R.I. 2008). Plaintiff, a church parishioner, brought this action against a church, alleging a priest had sexually abused her approximately thirteen years prior to filing suit. The Rhode Island Supreme Court affirmed the Providence County Superior Court's grant of summary judgment, confirming the suit was barred by the applicable statute of limitations. The Rhode Island Supreme Court also upheld the Superior Court's denial of plaintiff's motion to vacate the judgment, motion to recuse, and the acceptability of the lack of a hearing with respect to the three aforementioned motions.

FACTS AND TRAVEL

In October 1978, plaintiff Mary Ryan (hereinafter "plaintiff"), then seventeen years old, began a consensual sexual relationship with Roman Catholic priest Monsignor Louis Dunn (hereinafter "Dunn").[1] The relationship, which consisted of sexual activities including digital penetration and oral sex, lasted four years before it came to an abrupt end in June 1982 due to a forced act of intercourse between Dunn and plaintiff, against her will.[2]

Plaintiff did not talk about her relationship with Dunn, nor the June 1982 sexual assault, until 1986, when she made general statements about the relationship to her friend Gene Pistacchio.[3] Plaintiff did not provide this friend with any specific details until seven years later, in December 1993.[4] Around this time, the plaintiff discovered that Dunn had been sexually involved with other women, and realized he was a "fraud" who had "abused" her.[5] Following this realization, in 1994, the plaintiff began to tell various people about the sexual assault.[6] Plaintiff testified that

1. Ryan, et al. v. Roman Catholic Bishop of Providence, et al., 941 A.2d 174, 177 (R.I. 2008).
2. *Id.*
3. *Id.*
4. *Id.* at 177-78.
5. *Id.* at 178.
6. *Id.*

she did not mention the sexual incidents to anyone for such a long time because she believed Dunn possessed the power of God and therefore feared what he could do to her.[7] Plaintiff initiated this civil action against multiple defendants on December 6, 1995.[8] A separate criminal action against Dunn concluded in 1999 when the Rhode Island Supreme Court affirmed his sexual assault conviction.[9]

In addition to this case, alleged acts of sexual abuse by Rhode Island priests resulted in thirty-seven other civil actions being filed.[10] The Superior Court justice assigned to these cases (hereinafter the "motion justice")[11] became aware of statute of limitation problems, and urged all parties to engage in settlement proceedings.[12] Plaintiff was the only party who chose not to participate in the settlement and, after she made this decision, her counsel was allowed to withdraw.[13] The motion justice then granted five continuances, giving plaintiff another chance to mediate the case and time to find new counsel; however, mediation discussions failed, as did plaintiff's effort to secure new counsel, resulting in her decision to continue on a *pro se* basis.[14]

In November 2002, the defendants moved for summary judgment, asserting the claim was time barred by the applicable statute of limitations.[15] The motion justice granted summary judgment upon finding that the statute of limitations for a sexual abuse civil action is three years,[16] plaintiff did not file suit until years after the June 7, 1985 deadline,[17] and no valid tolling theory

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7. *Id.*
8. *Id.* at 178 n.8.
9. *Id.* at 178 n.4.
10. *Id.* at 178. To help ease the management of the many cases, all thirty-eight were assigned to a single justice of the Superior Court. *Id.*
11. *Id.* at 177 n.1.
12. *Id.* at 178.
13. *Id.* at 179. After three months of mediation, all participating parties settled. *Id.*
14. *Id.*
15. *Id.*
16. "Actions for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue, and not after." R.I. GEN LAWS § 9-1-14(b) (2008).
17. June 7, 1985 was the last date upon which suit could properly be commenced, being three years after the June 7, 1982 sexual assault that was the basis for this civil action. Ryan, et al. v. Roman Catholic Bishop of Providence, et al., 941 A.2d 174, 179 (R.I. 2008).

extended the statutory period.[18] Accordingly, in September 2003, the Superior Court entered final judgment dismissing all the plaintiff's claims against defendants.[19] Plaintiff filed a motion to reconsider the summary judgment, which was denied, resulting in the appeal to the Rhode Island Supreme Court in mid-September 2003.[20] In early 2004, plaintiff filed a motion to vacate the judgment and a motion to recuse the motion justice, both of which were denied.[21]

On appeal, plaintiff argues that the motion justice erred in: (1) granting the defendant's motion for summary judgment; (2) denying the motion to recuse; (3) denying the motion to vacate judgment; and (4) not having a hearing with respect to the three aforementioned motions.[22]

ANALYSIS AND HOLDING

Statutes of Limitation, Summary Judgment

The Court reviewed the grant of summary judgment *de novo*[23] and recognized the important public policies served by statutes of limitation.[24] "'Statutes of limitation are vital to the welfare of society . . . giving security and stability to human affairs'"[25] and "'preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'"[26] The Court held that the proper statute of limitation for a Rhode Island case seeking damages from a nonperpetrator defendant for injuries resulting from sexual abuse of a minor, pursuant to G.L.1956 § 9-1-14(b), is three years.[27] Agreeing with the motion justice, the Court explained that the sexual assault occurred on June 7, 1982, making June 7, 1985 the last date on which the plaintiff could

18. *Id.* at 179-80.
19. *Id.* at 180.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 180-81 (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)).
26. *Id.* at 181 (quoting Order of R.R. Telegraphers v. R.R. Express Agency, Inc., 329 U.S. 342, 348-49 (1944)).
27. *Id.* at 181.

file.[28] Plaintiff did not file until December 1995, more than ten years after the statutory period had lapsed, barring the claim.[29]

The plaintiff relied on three tolling theories to extend the statutory period.[30] First, plaintiff argued that the defendants had fraudulently concealed their criminal conduct and, pursuant to § 9-1-20, the statute of limitations should have tolled until the plaintiff discovered the existence of the claim.[31] This, however, requires the plaintiff to show the defendant made an actual misrepresentation of material facts; mere silence or inaction will not suffice.[32] The Court found no evidence that an actual misrepresentation was made, and thus the tolling period was inapplicable.[33] Second, plaintiff argued the discovery rule in § 9-1-51 should toll the statute of limitations until December 1993, when plaintiff learned that Dunn was a fraud.[34] The Court held that because § 9-1-51 was inapplicable to claims against nonperpetrator defendants, it was not a valid tolling theory.[35] Finally, plaintiff contended that defendants waived any statute of limitations defense by not raising it as an affirmative defense.[36] The record reveals that plaintiff never argued this theory in Superior Court, and it is well established that the Rhode Island Supreme Court will not review issues that are raised for the first time on appeal; thus, the plaintiff's argument was rejected.[37] With no valid tolling theories, the suit was time barred and summary judgment was affirmed in favor of the defendants.[38]

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28. *Id.*; *see supra* note 17.
29. *Id.* at 179-81.
30. *Id.* at 181-82.
31. *Id.* at 182.
32. *Id.*
33. *Id.* at 183.
34. *Id.*
35. *Id.* The Court emphasized that even if the statute applied to nonperpetrator defendants, the statute was enacted in 1993 and would not apply retroactively to revive claims that were already time barred, including the instant claim. Furthermore, the discovery rule tolls a claim only until a plaintiff in exercise of reasonable diligence would discover a claim, and it was agreed that a reasonable twenty-one year old would surely have known Dunn's forced sexual actions were wrong prior to the expiration of the three year statute of limitations period. *Id.* at 183-84.
36. *Id.* at 184.
37. *Id.* at 184-85.
38. *Id.* at 185.

The Motion to Recuse

Plaintiff also argued that the motion justice should have granted the motion to recuse because he had "an agenda to settle the cases" that was indicative of personal bias or prejudice.[39] Judicial officers must recuse themselves if they cannot make an impartial decision, but they have an equally great duty to not disqualify themselves where there is no sound reason to do so.[40] The Court acknowledged the worthy purposes that settlements serve, including lessening the strain on judicial resources and preventing litigants from sustaining high costs.[41] Therefore, instead of being recused, the Court thought the motion justice should be commended for actions taken to help the parties avoid prolonged litigation[42] and stated it "borders on the offensive" for a party to claim a justice should be recused for adhering to the well-favored policy of promoting settlements.[43] The motion justice's efforts to encourage settlements were in no way indicative of personal bias or prejudice, and thus the denial of the motion to recuse was affirmed.[44]

The Motion to Vacate Judgment

Plaintiff further argued that the motion to vacate the judgment should have been granted.[45] The Court noted that a motion to vacate is in the discretion of the Superior Court justice and will not be disturbed absent an abuse of discretion.[46] Plaintiff claimed the motion justice erred by ignoring evidence that showed other plaintiffs had entered into binding arbitration with various defendants.[47] The Court, however, could not think of any

39. *Id.* The Court commented that while they realized plaintiff was proceeding on a *pro se* basis, they were compelled to note that the plaintiff completely misunderstood the profound importance of the settlement and mediation processes in making this argument. *Id.* at 185 n.20.

40. *Id.* at 185 (citing Kelly v. Rhode Island Public Transit Auth., 740 A.2d 1243, 1246 (R.I. 1999)).

41. *Id.* at 186.

42. *Id.*

43. *Id.* at 186-87.

44. *Id.* at 187.

45. *Id.*

46. *Id.*

47. *Id*

rationale for how such evidence would have bearing on a motion to vacate summary judgment and thus upheld the denial of the motion.[48] It was noted that plaintiff raised additional arguments in the motion to vacate judgment, but the arguments were not briefed properly. [49] The issues were only stated, without any meaningful discussion or legal briefing, which constitutes a waiver of those issues.[50]

Absence of Oral Argument

Plaintiff finally argued on appeal that when the motion justice decided the motion for summary judgment, motion to vacate judgment, and motion to recuse, without oral arguments or a hearing, it was a denial of due process.[51] There is, however, no constitutional right to oral argument on questions of law, and the lack of an opportunity to supplement written submissions with oral advocacy is not a due process violation.[52] Moreover, no abuse of discretion will be found if the plaintiff cannot point to a part of its argument that cannot be adequately represented in writing.[53] The Court found that because plaintiff was able to make multiple written submissions, and could not point to an argument that was not adequately represented in writing, the lack of hearings was acceptable and not a constitutional violation.[54]

COMMENTARY

In reaching the conclusion that plaintiff's claim was to be dismissed, the Rhode Island Supreme Court was clearly sympathetic to plaintiff's situation, and was therefore careful to thoroughly explain the great need to abide by the procedural rules of our finely-tuned American judicial system.[55] The Court admitted that the plaintiff was a victim of heinous criminal conduct, who should have the right to relief; however, the Court

48. *Id.*
49. *Id.* at 187 n.24.
50. *Id.*
51. *Id.* at 187-88.
52. *Id.* at 188.
53. *Id.*
54. *Id.*
55. *Id.*

recognized that some wrongs and injuries simply do not lend themselves to full redress due to the overall nature and needs of our judicial system.[56] This underlying sentiment can be seen throughout the opinion. It is first apparent when the Court made a great effort to elaborate on the important societal purposes that statutes of limitation serve, and thus the need to not overlook them in morally troublesome cases, such as this case.[57] This theme can again be observed when the Court took an unusual amount of time to justify the importance of encouraging settlements, and the vital role that settlements have come to fill in our judicial system.[58] While the Rhode Island Supreme Court expressed sympathy towards plaintiff, the Court remained very levelheaded in applying the proper rules of law to reach the difficult yet necessary decision, as all courts should aim to do.

Additionally, this case demonstrates a plaintiff's ability to represent oneself in our legal system and proceed on a *pro se* basis. While it is encouraging to see the continued allowance of this practice and the ability of a lay person to advance as far as the Rhode Island Supreme Court on their own, the blatant disadvantages of not having a lawyer's knowledge came to light in this case. Plaintiff's argument regarding the defendants' waiver of a statute of limitations defense, and her arguments concerning the motion to vacate judgment, were all barred due to procedural errors that a lawyer would have been less likely to make.[59] The possibility that these lost arguments could have saved the case from dismissal makes one wonder if it is ever really fair to allow a party, unaware of many legal technicalities, to represent him/herself.

CONCLUSION

The Rhode Island Supreme Court affirmed the grant of summary judgment in favor of the defendants due to the claim being time barred, noting the importance of abiding by the procedural constructs of our justice system. The Rhode Island Supreme Court additionally upheld the Superior Court's denial of

56. *See id.*
57. *See id.* at 180-81.
58. *See id.* at 186-87.
59. *See id.* at 184-85, 187 n.24.

the motion to recuse, motion to vacate judgment, and the decision not to hold oral hearings in regard to such motions. Thus, the decision of the Superior Court was affirmed in all respects, and although potentially emotionally bothersome, it was determined that the plaintiff could not have her day in court and there is now nothing left to litigate.

Melissa M. McGow

Constitutional Law/Standing. *Bowen v. Mollis*, 945 A.2d 314 (R.I. 2008). The Rhode Island Supreme Court held that plaintiff, seeking a declaration that an upcoming election was not a "general election" within the meaning of the term as used in Article XIV, Section 1 of the Rhode Island Constitution, lacked standing because his status as a taxpayer was insufficient to establish a unique and cognizable injury that could be effectively resolved by judicial decision.

FACTS AND TRAVEL

Plaintiff, appearing pro se, brought suit against the Secretary of State[1] and the Rhode Island Board of Elections seeking a declaratory judgment that the 2004 election was not a "general election."[2] If the 2004 election were so declared, plaintiff argued that the question of whether the Rhode Island Constitution should be amended must be presented to the State's voters at the next general election in 2006 pursuant to Article XIV, Section 2 of the Rhode Island Constitution.[3]

The Secretary of State moved to dismiss the claim for failure to state a claim upon which relief may be granted.[4] The trial court, issuing its opinion on October 25, 2006, denied defendant's motion and held that plaintiff had stated a valid claim.[5] However, the court indicated it was unwilling to consider any claims regarding the 2006 election.[6] This was most likely due to the proximity of the upcoming election in early November.[7]

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1. Plaintiff originally brought suit against Matthew A. Brown, Rhode Island's former Secretary of State. The trial court updated the caption to instead include current Secretary of State, A. Ralph Mollis. Bowen v. Mollis, 945 A.2d 314, 315, n.2 (R.I. 2008).
2. *Id.* at 315.
3. *Id.*
4. *Id.* at 316.
5. *Id.* The court also stated that the Speaker of the House and the President of the Senate were indispensible parties, and allowed plaintiff to file an amended petition to rectify this omission. *Id.*
6. *Id.*
7. *See* Rhode Island Board of Elections, Elections & Voting: 2006

Plaintiff, thus unable to get a question on a constitutional convention on the 2006 ballot, filed an amended petition with a supporting memorandum containing an argument regarding the definition of "general election" as used in Article XIV, Section 1 of the Rhode Island Constitution, and a claim for a declaratory judgment that the upcoming 2008 election was not a general election.[8] The trial court did not explain plaintiff's motivation in seeking to have the 2008 election declared to not be a general election. Plaintiff's original action sought to declare that the question of a constitutional convention had not been posed to voters in ten years, and was thus required to be voted on in 2006.[9] With this argument foreclosed by the trial court, one would think plaintiff would seek to get this question put on the 2008 ballot. However, the Court stated that plaintiff argued against having 2008 considered a "general election" without further explanation.[10]

The trial court found that plaintiff had standing to bring this claim. It stated that if plaintiff was unable to bring this claim, no one would be able to because the issue is one of general applicability that affects all taxpayers equally.[11] On the merits of the case, the court declared that the 2008 election was a general election, rejecting plaintiff's argument that the election of Rhode Island "general officers" is a necessary element of a general election.[12] Plaintiff then appealed to the Rhode Island Supreme Court.[13]

BACKGROUND

The Rhode Island Constitution, adopted in 1842, contained an article providing a method of amendment for the State Constitution.[14] In 1883, in an advisory opinion to the Governor,

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General Election, http://www.elections.state.ri.us/elections/results/2006/generalelection/ (last visited Feb. 5, 2009).

8. *Id.* Plaintiff also two brought a claim based on Article XIV, section 2 of the Rhode Island Constitution, but pursued only the claim based on section 1 on appeal. *Id.*

9. *Id.* at 315.

10. *Id.* at 316.

11. *Id.*

12. *Id.*

13. *Id.*

14. *In re* Opinion to the Governor, 178 A. 433, 438 (R.I. 1935). The

the Rhode Island Supreme Court held that this was the exclusive method for Constitutional amendment.[15] Fifty-two years later, however, the Rhode Island Supreme Court changed its mind and opined that the Rhode Island legislature was empowered to propose and enact additional methods of Constitutional amendment if it so desired.[16] Pursuant to this authority, the Assembly enacted Article XIV of the Constitution, which established new procedures for proposing amendments and convening constitutional conventions.[17] Article XIV, Section 1 describes the process for proposing and approving amendments.[18] The General Assembly proposes amendments which, if approved by a majority vote of the Assembly, are submitted to the electorate to vote on at the next "general election."[19] Section 2 details the procedure for convening a constitutional convention, which is similar to the aforementioned proposal process: the General Assembly proposes a convention and, upon majority approval, the same question is posed to voters.[20]

Section 2 imposes three additional requirements.[21] First, the General Assembly (or the Governor, if the Assembly does not act) must organize a "bi-partisan preparatory commission" to gather information on constitutional issues.[22] Second, if voters agree that a constitutional convention should be held, there are additional measures which must be taken.[23] Finally, if the question of whether there should be a constitutional convention has not been posed to voters in ten years, the Secretary of State

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method under former Article XIII was more cumbersome than the present method and required a three-fifths majority of voters in order to secure a constitutional amendment. *See id.* at 437.

15. *Id.* at 439.
16. *Id.* at 437-8.
17. R.I. CONST. art. XIV, § 2.
18. R.I. CONST. art. XIV, § 1.
19. *Id.*
20. R.I. CONST. art. XIV, § 2.
21. *Id.*
22. *Id.*
23. *Id.* The most significant measure is that the General Assembly must provide for the election of delegates to the convention. The number of delegates must equal the number of members in the House, and they must also be elected by the same process by which House members are elected. If there are amendments sought after the constitutional convention has concluded, the amendments must once again be presented to the electorate and approved by a majority of voters. *Id.*

must submit this question at the next "general election."[24]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court unanimously[25] held that plaintiff lacked standing to pursue his claim for two related reasons.[26] First, the Court held that plaintiff did not suffer an injury in fact.[27] Second, even if plaintiff's alleged injury satisfied the injury in fact requirement, the Court held that it is "indistinguishable from the interests of the general public" and unlikely to be redressed by a favorable outcome.[28] Under Rhode Island law, plaintiffs lacking standing may be allowed to pursue a claim if they can demonstrate that the claim involves an issue of "substantial public interest."[29] The Rhode Island Supreme Court has previously held that "whether the public has a right to vote at a public referendum" on simulcast out-of-state horse racing was an issue of substantial public interest,[30] as was the legitimacy of Vincent "Buddy" Cianci's mayoral campaign.[31] Here, however, the Court did not find that plaintiff's claim involved a "substantial public interest."[32]

In addition to the Court's holding, the Court also expressed approval of the trial court's definition of general election: "one that is regularly scheduled on the same day – 'the first Tuesday next after the first Monday in November in even numbered years.'"[33]

COMMENTARY

Rhode Island's judicially-crafted rule, allowing an issue of "substantial public interest" to effectively circumvent traditional standing requirements, is generous compared to the United States

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24. *Id.*
25. Bowen v. Mollis, 945 A.2d 314, 318 (R.I. 2008). The Court's opinion was unanimous; however, Justices Suttell and Robinson did not participate. *Id.*
26. *Id.* at 317.
27. *See id.* at 317: "[Plaintiff] has failed to allege a particularized injury . . ."
28. *See id.*
29. *Id.*
30. Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992).
31. Gelch v. State Bd. of Elections, 482 A.2d 1204, 1207 (R.I. 1984).
32. Bowen v. Mollis, 945 A.2d 314, 317 (R.I. 2008).
33. *Id.* at 317-8.

Supreme Court's standing jurisprudence.[34] Indeed, the Rhode Island Supreme Court has, on numerous occasions, allowed plaintiffs to proceed with their claims based on the "substantial public interest" involved.[35] However, as proved here, the "substantial public interest" requirement is not automatically – or easily – met.[36]

While the Court did not provide a precise definition of "substantial public interest," the Court's reversal of the trial court's holding sheds some light on the issue. The trial judge likely held that plaintiff's claim implicated a substantial public interest because it involved a procedure mandated by the Rhode Island Constitution.[37] Also, the trial court opined that plaintiff should be allowed to bring this claim because, if he were not able to, it is unlikely that anyone else could.[38] This conception of "substantial public interest" suggests a "standing by necessity" argument: if no one will be allowed to litigate a public issue due to his or her inability to establish standing, a court should allow a willing litigant to do so.[39] The Rhode Island Supreme Court, however, rejected this argument in whole when it stated: "Although on rare occasions this Court has overlooked the question of standing so it can reach the merits of a controversy, we do so only in cases of substantial public interest. We respectfully decline to do so today."[40]

The short shrift given plaintiff's arguments regarding standing raises three implications. First, it suggests that the word "substantial" in the phrase "substantial public interest" is more than a mere superlative. Whether or not Rhode Island

34. *See e.g.* Hein v. Freedom From Religion Found. Inc., 127 S.Ct. 2553 (2007), where the Supreme Court further narrowed *Flast v. Cohen*'s already narrow exception for taxpayer standing in challenges under the Establishment Clause.

35. *See* Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992); Gelch v. State Bd. of Elections, 482 A.2d 1204, 1207 (R.I. 1984); Sennott v. Hawksley, 241 A.2d 286 (R.I. 1968).

36. *See Bowen*, 945 A.2d at 317; *See also* Blackstone Valley Chamber of Commerce v. Pub. Utils. Comm'n, 452 A.2d 931, 932 (R.I. 1982) (change in structure of agency's residential rate for utilities not an issue of substantial public interest).

37. *Bowen*, 945 A.2d at 317.

38. *Id.*

39. *Id.*

40. *Id.*

voters will be allowed to vote for a constitutional convention – and, if so, when – is undoubtedly of public interest. However, it was not sufficiently "substantial" to satisfy the Court.[41] Perhaps this was because the issue of whether the constitution should be amended is but the first step towards amendment.[42] Regardless, the Court's dismissal of this argument suggests that the "substantial public interest" requirement is not easily met.[43]

Second, the Court's finding that plaintiff lacked standing rejects the trial court's "standing by necessity" finding. The Rhode Island Supreme Court made this explicit when it stated that: "[Plaintiff] has failed to . . . demonstrate that he has a stake in the outcome that distinguishes his claims from the claims of the public at large."[44]

Finally, while it is unclear from the Court's brief opinion, the rejection of plaintiff's standing to pursue his claim may indicate a desire to accord with the relatively more restrictive federal standing rules.[45] However, the Court's failure to cite any recent United States Supreme Court jurisprudence on the issue refutes this argument.[46]

After dismissing plaintiff's claim for lack of standing, it seems unnecessary that the Court offered its opinion on the merits of the case and endorsed the trial court's definition of "general election."[47] However, the Court did not go far out of its way in issuing this dicta because an instructive definition was close at hand. Section 17-1-2(2) of the Rhode Island General Laws offers the definition given by the trial court and quoted by the Supreme Court.[48] While this statute defines the term as used in Rhode Island election law, and is not binding on constitutional issues, the Court implied that the definitions are synonymous, and thus the "general election" spoken of in the constitution has no additional

41. *Id.*
42. R.I. CONST. art. XIV, § 2.
43. Bowen v. Mollis, 945 A.2d 314, 317 (R.I. 2008).
44. *Id.*
45. *See* Hein v. Freedom From Religion Found. Inc., 127 S.Ct. 2553 (2007).
46. *See Bowen*, 945 A.2d at 317. The most recent Supreme Court case on the issue cited by the Court is *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
47. *Bowen*, 945 A.2d at 317-8.
48. R.I. GEN LAWS. § 17-1-2(2) (1956).

meaning.[49] This language, though dicta, is likely to be applied to similar actions given its unqualified approval by the Court.[50]

Nevertheless, the Court's discussion of the merits of plaintiff's case is a formalistic peculiarity. Courts often couch their opinions on non-essential matters in hypothetical terms, or refuse to discuss such matters entirely. Here, however, the Court effectively circumvented the requirements of standing by opining on the merits of the case.[51] Plaintiff sought only declaratory relief as to whether the 2008 election would be a general one and, though he was found to lack standing, he received this information.[52] However, while the Court's approach may betray formalistic judicial conventions, it is eminently practical. The definition of "general election" as used in the Rhode Island Constitution has been effectively conveyed to future litigants, potentially avoiding future disputes.[53]

CONCLUSION

The Rhode Island Supreme Court held that plaintiff's injury as a taxpayer was insufficient to establish an injury in fact and that a judicial decision would not redress his complaint. Additionally, the Court refused to overlook plaintiff's lack of standing because plaintiff's claim did not meet Rhode Island's "substantial public interest" exception. Implicit in the Court's opinion is that the issue of whether or not voters will be allowed to vote on the question of whether a constitutional convention shall be convened or not is not sufficiently "substantial" as to qualify as an exception to normal requirements of standing.

Additionally, the Court cited with approval the trial court's formulation of "general election," which revolves around when an election is held, not who seeks to be elected. The Court's unambiguous approval of this definition clarifies that the definition of "general election" provided by 17-1-2(2) of the Rhode Island General Laws is identical to the definition contained in Article XIV § 1 of the Rhode Island Constitution.

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49. *Bowen*, 945 A.2d at 317-8
50. *Id.*
51. *Id.*
52. *Id.* at 316.
53. *Id.* at 317, 318.

Daniel W. Morton-Bentley

Constitutional Law. *State v. Faria*, 947 A.2d 863 (R.I. 2008). A Rhode Island statute establishing a classification between felons and non-felons implicates neither a suspect class nor a fundamental right. Thus, Rhode Island General Laws § 12-1-12, which prohibits individuals acquitted or exonerated of a criminal charge from expunging related criminal records if they have had a prior felony conviction, does not violate fourteenth amendment equal protection rights.

FACTS AND TRAVEL

In February 2006, Brian Faria (hereinafter "Defendant") was arrested and charged in District Court with two counts of unlawful possession of a controlled substance.[1] Concluding that there was insufficient evidence to warrant a felony prosecution, the Attorney General declined to file a criminal information.[2] Pursuant to § 12-1-12,[3] Defendant thereafter moved to destroy all records of his arrest and exoneration.[4] In a separate filing, Defendant additionally requested that the court records be sealed and/or expunged.[5] This request apparently was reliant upon § 12-

1. *See* State v. Faria, 947 A.2d 863, 864 (R.I. 2008).
2. *See id.*
3. R.I. GEN. LAWS § 12-1-12 states in pertinent part: (a) Any fingerprint, photograph, physical measurements, or other record of identification, heretofore or hereafter taken by or under the direction of the attorney general, the superintendent of state police, the member or members of the police department of any city or town or any other officer authorized by this chapter to take them, of a person under arrest, prior to the final conviction of the person for the offense then charged, shall be destroyed by all offices or departments having the custody or possession within sixty (60) days after there has been an acquittal, dismissal, no true bill, no information, or the person has been otherwise exonerated from the offense with which he or she is charged, and the clerk of court where the exoneration has taken place shall, consistent with § 12-1-12.1, place under seal all records of the person in the case including all records of the division of criminal identification established by § 12-1-4; provided, that the person shall not have been previously convicted of any felony offense.
4. *See Faria* at 864.
5. *See id.* at 864-65.

1-12.1.[6] In essence, §§ 12-1-12 and 12-1-12.1 allow for the destruction of certain police records and expungement via sealing or destruction of certain court records.[7] However, neither section permits relief for persons previously convicted of a felony offense.[8]

Defendant had in the past been convicted of a felony offense.[9] Defendant argued before the District Court that, because §§ 12-1-12 and 12-1-12.1 precluded the destruction or sealing of records relating to his two counts of unlawful possession of a controlled substance, his constitutional rights had been violated.[10] Specifically, Defendant argued that §§ 12-1-12 and 12-1-12.1 denied him equal protection under the law as guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments.[11] Arguing that such classifications bear no reasonable relationship to the public health, welfare, or safety, Defendant contended the statutes unconstitutionally discriminate against persons with previous felony convictions.[12]

The state objected to the Defendant's motion and argued that the classification is rationally related to a legitimate state interest.[13] Additionally, the state asserted that where the constitutionality of a statute is attacked, it is the moving party's burden (here the Defendant) to overcome every conceivable basis that might support the legislative classification.[14] The state contended that the Defendant failed to meet this burden.[15] Moreover, the state maintained that the legislative classification advanced a legitimate state interest by supporting the maintenance of a comprehensive history of a felon's contacts with

6. R.I. GEN. LAWS § 12-1-12.1 states in pertinent part: (a) Any person who is acquitted or otherwise exonerated of all counts in a criminal case, including, but not limited to, dismissal or filing of a no true bill or no information, may file a motion for the sealing of his or her court records in the case, provided, that no person who has been convicted of a felony shall have his or her court records sealed pursuant to this section.

7. *See* State v. Faria, 947 A.2d 863, 865 (R.I. 2008).

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

the criminal justice system.[16]

On July 18, 2006, the District Court issued a written decision which held that §§ 12-1-12 and 12-1-12.1 violated the Defendant's constitutional equal protection rights.[17] Specifically, the court noted that the statutory scheme in §§ 12-1-12 and 12-1-12.1 established two categories of people – those with felony convictions on their record and those without felony convictions on their record.[18] The court found no rational basis for distinguishing between felons and non-felons in the statutory language of §§ 12-1-12 and 12-1-12.1.[19] Additionally, the court rejected the state's contention that the comprehensive maintenance of all criminal records relating to felons might help law enforcement professionals to identify patterns of criminal activity and apprehend criminals.[20]

On writ of certiorari, the Supreme Court of Rhode Island accepted review of the District Court's decision.[21]

ANALYSIS AND HOLDING

The Supreme Court stated that review was limited to examining the record to determine if an error of law had been committed.[22] When reviewing a constitutional challenge to a statute, the Court stated that it would use the "greatest possible caution."[23] In beginning such a review, the Court embraced the principle that legislative enactments are presumed valid and constitutional. [24] Additionally, a statute must be capable of being characterized as palpably and unmistakably in excess of legislative power to be deemed unconstitutional.[25] Finally, the Court stressed, "Unless the party challenging the constitutionality

16. *See id.*
17. *See id.*
18. *See id.* at 865-66.
19. *See id.* at 866.
20. *See id.*
21. *See id.* at 867.
22. *Id.* (citing Crowe Countryside Realty Ass'n. Co. v. Novare Eng'rs, Inc., 891 A.2d 838, 840 (R.I. 2006)).
23. *Id.* (citing State v. Hall, 940 A.2d 645, 657 (R.I. 2008)) (quoting Cherenzia v. Lynch, 847 A.2d 818, 822 (R.I. 2004)).
24. *Id.* (citing Newport Court Club Assoc. v. Town Council of Middletown, 800 A.2d 405, 409 (R.I. 2002)).
25. *Id.* (citing *Cherenzia*, 847 A.2d at 822).

of a statute can prove beyond a reasonable doubt that the act violates a specific provision of the [Rhode Island] [C]onstitution or the United States Constitution, this court will not hold the act unconstitutional."[26]

The issue was whether the distinction between felons and non-felons codified for the purposes of §§ 12-1-12 and 12-1-12.1 violated the Fourteenth Amendment of the United States Constitution, which "provides that a state shall not 'deny to any person within its jurisdiction the equal protection of the laws.'"[27] The Rhode Island Supreme Court determined that the constitutionality of the legislation was properly analyzed under a minimum-scrutiny test because the felon/non-felon classification involved neither a fundamental right nor a suspect class of persons.[28]

"To ascertain whether a rational relationship exists, the proper inquiry is not whether [a] court can find a rational basis for the statute, but whether 'the General Assembly rationally could conclude that the legislation would resolve a legitimate problem.'"[29] A statute will survive a constitutional challenge provided the Court can conceive of any reasonable statutory justification or any legitimate objective.[30] For this reason, the burden is high upon the party seeking to overcome the constitutional validity of a statutory classification. To wit, the moving party "has the burden 'to negate *every* conceivable basis which might support [the legislative classification].'"[31]

In applying rational-basis review to §§ 12-1-12 and 12-1-12.1, which "draw a distinction between those persons acquitted or exonerated of a crime without a previous felony conviction on their record and those acquitted or exonerated with a previous felony conviction," the Court looked to the practical purpose of the

26. *Id.* (citing *Cherenzia*, 847 A.2d at 822) (citing City of Pawtucket v. Sundlun, 662 A.2d 40, 44-45 (R.I. 1995)).

27. *Id.* (quoting U.S. CONST. Amend. XIV, sec. 1); *see also id.* at n.4 (the Court noted that the Defendant's equal protection claim as it relates to the Fifth Amendment was inapplicable here because the Fifth Amendment applies to federal action only).

28. *See id.* at 868 (citing Riley v. The Rhode Island Dept. of Envtl. Mgmt., 941 A.2d 198, 206 (R.I. 2008)).

29. *See id.* (citing Mackie v. State, 936 A.2d 588, 596 (R.I. 2007)).

30. *See id.* (citing *Mackie*, 936 A.2d at 596).

31. *See id.* (citing *Mackie*, 936 A.2d at 597).

statutory distinction.[32] The statutes allow persons with no previous felony convictions "to have certain records of identification destroyed and court records sealed, whereas convicted felons are denied similar relief."[33] Noting that the District Court correctly represented the rational-basis review as "a 'relaxed standard' that is 'easily satisfied,'" the Court concluded that it needed only to find a reasonable rationale for distinguishing between felons and non-felons sufficient to justify prohibiting felons from having records of acquittals or exonerations sealed and destroyed.[34]

The state contended that the District Court erred in finding no permissible basis to support §§ 12-1-12 and 12-1-12.1's felon/non-felon classification.[35] The Supreme Court agreed.[36] Though the Court did not explicitly state the position, the holding avers that a permissible basis to justify the classification need not exist, but only a conceivable basis.[37] Outlined in the Attorney General's brief, the state's interest in effective law enforcement was accepted by the Court as one conceivable basis for §§ 12-1-12 and 12-1-12.1's felon/non-felon classification.[38] Defendant failed to negate this rational basis.[39]

In reaching its decision, the Rhode Island Supreme Court cited the affirmed constitutionality of a Louisiana statute similar to the one at issue. [40] There, reasoning "that arrest records were 'useful in uncovering criminal conduct, aid[ed] in setting bond, and facilitate[d] the work of correctional institutions,'" [41] the Louisiana Supreme Court "held that retaining records of felony arrests served a valid state interest."[42] Additionally, the Rhode

32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.*
37. *See id.* (citing Mackie v. State, 936 A.2d 588, 597 (R.I. 2007)).
38. *See id* at 868-69.
39. *See id* at 868.
40. *See id.* at n.5. (citing LA.REV.STAT.ANN. § 44:9(E)(1)(a) (2007)) (allowing for the destruction of misdemeanants' arrest records, but prohibiting the destruction of the arrest records for persons arrested for felony offenses).
41. *See id.* at 868-69.
42. *See id.* at 868. (citing State v. Expunged Record, 881 So.2d 104, 105-06 (La. 2004)) (quoting State v. Nettles, 375 So.2d 1339, 1342 (La. 1979)).

Island Supreme Court cited to a recent Supreme Court of Georgia ruling that "recognized law enforcement as a state interest sufficient to satisfy the rational-basis review."[43] There the Supreme Court of Georgia held that the legislative interest in creating a permanent identification record of convicted felons for law enforcement purposes "was justified 'based on the difference between the types and seriousness of the offenses as well as the severity of punishment involved' and the fact that 'convicted felons are more likely to violate the law than ordinary citizens.'"[44]

Relating these decisions to §§ 12-1-12 and 12-1-12.1, the Court held that the Rhode Island legislature could rationally justify the proposition that denying convicted felons the privilege of having specified court records sealed or destroyed promotes the state's interest in effective law enforcement.[45] Moreover, the Court cited its own past ruling in support of the principle that procedural controls and safeguards that promote effective law enforcement logically serve an important state interest.[46] Here, the Court concluded, "We are satisfied that maintaining records of felons' arrests aid the state's legitimate interest in law enforcement, and further, the statutory classification between felons and non-felons rationally relates to this interest."[47]

For the aforementioned reasons, the Court reversed the District Court rulings and remanded.[48] The Supreme Court was satisfied that the felon/non-felon classifications of §§ 12-1-12 and 12-1-12.1 are rationally related to a legitimate state interest in law enforcement, and therefore do not violate equal protection guarantees.[49]

COMMENTARY

This decision is most remarkable for an absence of

43. *See id.* at 869. (citing Quarterman v. State, 651 S.E.2d 32, 34 (Ga. 2007)).

44. *See id.* (quoting *Quarterman*, 651 S.E.2d at 34).

45. *See id.*

46. *See id.* (citing State v. Anil, 417 A.2d 1367, 1370 (R.I. 1980)) (concluding that the state must be able to withhold the identity of persons who provide information of criminal activity so as to protect the "public interest in effective law enforcement").

47. *See id.*

48. *See id.*

49. *See id.*

remarkableness. In *State v. Faria*, the Court sets forth no dicta but progresses by way of a diligence intent upon leaving no sign of the craftsman behind. Each component of the Court's rationale and holding is tightened into place within the pre-drilled and defined narrows of *stare decisis*.

The Defendant argued that the felon/non-felon classification leaves felons unfairly exposed to social stigma and economic disability.[50] The state argued that the classification promotes effective law enforcement because it positions law enforcement personnel to better identify patterns of criminal activity, which will aid swifter apprehension of criminals.[51] The neat counterpoise of such socially-based arguments tempts comment, but the Court refrains. Instead, the Court conducts a sober calculation of the judicial standard requiring that the Court defer to the General Assembly's power to make rational determinations aimed at solving legitimate social problems. But even here, the Court is not content to rely upon itself as the sole reference point for scoring its mark. Following the timeworn adage that it is better to measure twice and cut once, the Court cites to sister-state models demonstrating judicial restraint in relation to the fulfillment of the separation of powers principle. The Rhode Island Supreme Court cites favorably to Louisiana and Georgia Supreme Court decisions that illustrate how the minimal-scrutiny test operates when operating well. It is a measure that implies great deference to the legislature's prerogative in applying its discretion; it is a measure that respects the unique position of the elected legislature as the truest and nearest implementer of the will of the citizenry in matters that do not implicate the Constitution.

In *Faria*, the Court affirms not the propositions implicit in the General Assembly's enactment of § 12-1-12, but only the General Assembly's right to enact such a proposition. What this proposition is remains subject to varying interpretations. What is not open to interpretation is the straight-line simplicity of the decision's design. Remarkable for what it does not say and does not do, in both outcome and method, this case provides a model of the workmanlike self-restraint that underscores principled,

50. *See id.* at 866.
51. *See id.*

unassuming adherence to the separation of powers doctrine.

CONCLUSION

In *State v. Faria*, the Rhode Island Supreme Court found that §§ 12-1-12 and 12-1-12.1 survived the Defendant's constitutional challenge on equal protection grounds. Absent implication of a suspect class or a fundamental right, the constitutional validity of a statutory classification is properly analyzed under a minimal-scrutiny test. The statute will survive the constitutional challenge so long as the Court can conceive the existence of a rational relationship flowing from the statutory classification in service of a legitimate state interest. To successfully advance an equal protection challenge within this limited context, the moving party bears the high burden of negating every conceivable rational basis which might justify the statutory legislation. Here, because 1) a rational state interest in effective law enforcement animates the legislation, and 2) the Defendant failed to negate this rationale, the Rhode Island statute establishing felon/non-felon classifications that thereby prohibit the former class of individuals acquitted or exonerated of a subsequent criminal charge from expunging related criminal records did not violate the Fourteenth Amendment.

Brian Fielding

Constitutional Law. *State v. Tiernan*, 941 A.2d 129 (R.I. 2008). The Sixth Amendment of the United States Constitution, guaranteeing an accused the right to confront the witnesses against them, includes the right to meaningful cross-examination with regard to potential witness bias. In determining what constitutes "meaningful" cross-examination, the Rhode Island Supreme Court held that cross-examination of a witness with regard to potential civil suits on the same issue as the criminal proceeding is allowed as a matter of right for the purpose of establishing potential bias, under both the Sixth Amendment of the United States Constitution and Article I, Section 10 of the Rhode Island Constitution. Thus, a defendant's Sixth Amendment rights are violated when his or her ability to cross-examine the complaining witness is excessively restricted to the point where it acts as a denial of the right to explore potential bias of the witness.

FACTS AND TRAVEL

On March 27, 2005, Peter Tiernan and his wife became involved in an argument with a bicyclist while on their way to church in their automobile.[1] While driving along a two lane road they came upon two bicyclists traveling along side each other, one of which was Kevin Finnegan.[2] The bicyclists were traveling on the same side of the road and in the same direction as the Tiernans.[3] As Mr. Tiernan sounded his horn and passed the bicyclists, an argument erupted between Mr. Tiernan and Mr. Finnegan, after which Mr. Tiernan stopped his vehicle.[4] With the two bicyclists positioned alongside the vehicle, Mr. Finnegan on the driver's side and the other on the passenger side, Mr. Tiernan and Mr. Finnegan continued their heated conversation.[5]

Mr. Finnegan alleges that once the conversation had ended

1. State v. Tiernan, 941 A.2d 129, 130 (R.I. 2008).
2. *Id.*
3. *Id.*
4. *Id.* at 131.
5. *Id.*

and while Mr. Tiernan was driving away, the automobile struck him causing him to fall to the ground.[6] The Tiernans continued on their way to church and only after parking their vehicle did they notice a scratch on their driver's side door.[7] They decided to go to the police station.[8] However, on their way to the station they were pulled over by a police officer who questioned them about the earlier incident.[9]

In July 2005, Mr. Tiernan was charged with felony assault in violation of R.I.G.L. § 11-5-2.[10] At his criminal defense trial, defense counsel attempted to cross-examine Mr. Finnegan with regard to the nature and extent of the injuries he sustained, and the prosecution objected on the grounds of relevance.[11] Defense counsel argued that information about Mr. Finnegan's alleged injuries was necessary to show witness bias; specifically, that Mr. Finnegan was biased in that he was motivated to testify in a certain way because he was seeking to pursue a civil suit against Mr. Tiernan for monetary damages.[12] Such bias, the defense argued, was evident by the presence of an attorney retained by Mr. Finnegan, as well as Mr. Finnegan's notification to defendant's insurance that he was a potential party to a civil action.[13] Furthermore, information about Mr. Finnegan's injuries went towards witness credibility given the fact that Mr. Finnegan's statements about his injuries had changed over time.[14]

The trial justice allowed defense counsel to question Mr. Finnegan with regard to his intention to file a civil suit stemming from the March 2005 incident.[15] However, the defense counsel was limited to only one question.[16] The trial justice barred all

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6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* The statute reads, in pertinent part: "Every person who shall make an assault or battery, or both with a dangerous weapon, or with acid or other dangerous substance, or by fire, or an assault or battery which results in serious bodily injury shall be punished by imprisonment for not more than twenty (20) years." R.I GEN.LAWS §11-5-2(a) (2008).
11. *Tiernan*, 941 A.2d at 131.
12. *Id.*
13. *Id.* at 132.
14. *Id.* at 131.
15. *Id.* at 132.
16. *Id.* The trial justice's limitation on defense counsel's cross-

cross-examination as to "damages for injuries, pain and suffering, discomfort or any of those things."[17]

A jury found Mr. Tiernan guilty of assaulting Mr. Finnegan with a deadly weapon to wit, an automobile, and he was sentenced to four years probation.[18] Further, the trial court ordered Mr. Tiernan to have no contact with Mr. Finnegan, attend anger management classes and make restitution.[19] Mr. Tiernan filed a timely appeal.[20]

HOLDING AND ANALYSIS

On appeal, the defendant argued that the trial justice excessively limited his cross-examination of Mr. Finnegan by allowing only one question on the issue of Mr. Finnegan's potential civil action against the defendant.[21] In doing so, he argued, the trial justice violated his Sixth Amendment right to confront the witness against him, by precluding the opportunity for him to explore the issue of potential bias.[22]

Both the Sixth Amendment of the United States Constitution and Article 1, Section 10 of the Rhode Island Constitution afford an accused the right to be confronted by the witnesses against him or her in a criminal proceeding.[23] The courts have continuously interpreted the right of confrontation broadly; not as simply

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examination of Mr. Finnegan resulted in the following exchange:

> "[DEFENSE COUNSEL]: Mr. Finnegan, is it your intention to seek monetary damages from Mr. Tiernan for damages that you say you sustained as a result of this incident on March 27, 2005?"
>
> "[Mr. Finnegan]: Yes."

Id. at 132.

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 130.
22. *Id.* at 132.
23. *Id.* at 132-133. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him. . . ."); R.I. CONST. Art. I, § 10 ("In all criminal prosecutions, accused persons shall enjoy the right. . . to be confronted with the witnesses against them. . . ."); *see also* State v. Pettiway, 657 A.2d 161, 163-64 (R.I. 1995); State v. Freeman, 473 A.2d 1149, 1153-54 (R.I 1984); State v. Parillo, 480 A.2d 1347, 1356 -59 (R.I 1984); State v. DeBarros, 441 A.2d 549, 551-53 (R.I. 1982).

limited to physical confrontation but to the right of cross-examination of an accusing witness.[24]

Drawing upon its earlier holding in *State v. Parillo*, the Court reiterated the importance of the right of cross-examination as "it is the principal means by which the credibility of the witness and truthfulness of his [or her] testimony can be tested."[25] Not only does cross-examination go toward witness credibility, but also to bias, both of which are relevant and significant to the finders of fact for weighing evidence.[26]

The Court held that while trial justices possess broad discretion in placing limitations on cross-examination for the purpose of preventing harassment, prejudice, confusion or repetitive testimony, restricting testimony elicited to show bias is outside the bounds of a trial justice's discretion.[27] A justice's authority to limit testimony with regard to bias applies only after the defendant has been afforded sufficient cross-examination to satisfy the Sixth Amendment.[28]

In the present case, the defendant was afforded the opportunity to ask only a very basic question concerning the witness's potential civil action.[29] The trial justice's restriction to one question on the issue of whether the witness was contemplating a civil suit had the effect of foreclosing the opportunity of the defendant to explore the witness's bias and thus was a violation of the defendant's Sixth Amendment right to confront his accuser.[30]

The Court relied heavily on the reasoning put forth in *United States v. Gambler* by the Court of Appeals for the District of Columbia, and in other federal and state appellate jurisdictions, which allow the cross-examination and presentation of evidence of a witness's pending or contemplated suit against a defendant arising from the same incident as the criminal charges.[31] Such

24. *Tiernan*, 941 A.2d at 133 (citing Davis v. Alaska, 415 U.S. 308, 315 (1974)).
25. *Id.* (citing *Parillo*, 480 A.2d at 1357).
26. *Id.* at 134 (citing 3A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 940 at 775 (Chadbourn rev. 1970)).
27. *Tiernan*, 941 A.2d at 134.
28. *Id.* (quoting *Parillo*, 480 A.2d at 1357).
29. *Tiernan*, 941 A.2d at 135.
30. *Id.*
31. *Id.* at 135-136.

evidence, they noted, invariably goes to credibility and potential bias as it demonstrates a financial interest in the outcome of criminal proceedings.[32]

Applying the Court's prior interpretation of the Sixth Amendment, the Court held that cross-examination of a witness with regard to potential civil suits on the same issue as the criminal proceeding is allowed as a matter of right for the purpose of establishing potential bias.[33] Limitations on cross-examination which preclude the exploration of potential bias through the introduction of evidence of a civil suit is a violation of defendant's rights under the Sixth Amendment of the United States Constitution and Article 1, Section 10 of the Rhode Island Constitution.[34]

COMMENTARY

The Sixth Amendment and its counterpart in the Rhode Island Constitution establish the right of a defendant to be confronted by the witnesses against him.[35] This has been broadly interpreted to encompass not merely the right to physical confrontation, but also the right to question witnesses.[36] Cross-examination is thus a pivotal tool, and in many instances the only tool, in a defendant's arsenal by which to scrutinize and explore the motives and reasons behind a witness's accusation. It provides the fact-finder with the opportunity to evaluate witness testimony as a whole and not in a vacuum, allowing the fact-finder to take in the witness's body language, emotions and mannerisms.

In correctly finding a violation of Tiernan's Sixth Amendment right, when cross-examination was unnecessarily restricted by barring exploration of the witness's contemplated civil suit, the Court has, once again, reinforced the importance of the right to

32. *Id.* at 136 (citing State v. Whitman, 429 A.2d 203, 205 (Me. 1981)).
33. *Tiernan*, 941 A.2d at 137.
34. *Id.*
35. *Id.* at 132-133. *See supra* note 22.
36. *Id.* at 133. *See also* Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (the right to confrontation encompasses not just physical confrontation of the witness but the opportunity for cross-examination); Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986) (reiterating *Davis* that Sixth Amendment of United States Constitution affords opponent both physical confrontation as well as opportunity for cross-examination).

cross-examination.[37] Citing to its previous opinions in *Parillo* and *State v. Anthony*,[38] the Court described the role of cross-examination as a primary means of evaluating witness creditability, prejudice, bias and ulterior motives and, as such, a defendant should be allowed "reasonable latitude" in cross-examination to explore those issues further.[39]

Thus, the Rhode Island Supreme Court's holding allowing evidence of pending or contemplated civil suits that relate to the case being tried is directly in line with the Court's protections of a defendant's right to cross-examine the witnesses against him. Civil suits have a tendency to illustrate a witness's financial stake in the outcome of criminal proceedings, which in turn acts as a strong motive for a witness with a civil action to testify a certain way in the hope of affecting the outcome of their civil action.

Two possible ways exist by which a civil suit can be influenced by criminal proceedings. The most obvious is the outcome: if the defendant is convicted in a criminal proceeding of a charge that is the basis of a civil proceeding, the conviction essentially secures a judgment against him in the civil proceeding. The higher burden of proof required in a criminal case will most certainly carry significant weight with the fact-finder in a civil proceeding where the burden of proof is considerably lower.[40]

Second, testimony in the criminal proceeding can be used in the civil proceeding to impeach the witness if testimony in the criminal case varies from the testimony in the civil case.[41] Thus the witness's civil action is fundamental to the establishment of potential bias by the defendant, and limitations on cross-examination that preclude a defendant from exposing a source of potential bias are violations of the defendant's Sixth Amendment right of confrontation.

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37. *See Tiernan*, 941 A.2d at 133 (quoting State v. Parillo, 480 A.2d 1347, 1357 (R.I. 1984)).

38. *Parillo*, 480 A.2d 1347; State v. Anthony, 422 A.2d 921 (R.I. 1980).

39. *Tiernan*, 941 A.2d at 133-134 (citing *Parillo*, 480 A.2d at 1357; quoting *Anthony*, 422 A.2d at 924).

40. *Compare* R.I. GEN. LAWS § 11-1-2.1 (2008) ("[the standard of proof for a criminal case shall be beyond a reasonable doubt]") *with* § 9-1-2 (2008) ("[the standard of proof for a civil case shall be by a preponderance of evidence]").

41. *See, e.g.*, State v. Espinal, 943 A.2d 1052, 1059 (R.I. 2008).

CONCLUSION

This case established the limits of a trial justice's discretion in imposing restrictions on the defendant's ability to cross-examine witnesses regarding pending or potential civil actions that relate to a criminal proceeding. While a trial justice has discretion to limit cross-examination, this applies only after there has been sufficient cross-examination to satisfy the Sixth Amendment. Thus, under the Sixth Amendment and Rhode Island Constitution Article I, Section 10, a defendant must be afforded the opportunity to cross-examine witnesses about related civil suits for the purpose of exploring bias on the part of the witness.

Christina A. Hoefsmit

Contract Law. *National Refrigeration, Inc. et al. v. The Travelers Indem. Co. of America et al.*, 947 A.2d 906 (R.I. 2008). In this case, the Rhode Island Supreme Court held that a petition for arbitration under an insurance contract is a legal action for the purposes of a limitations period. Additionally, the Court held that the insurer's promise to continue investigation of the insured's claim did not preclude the insurer from asserting the defense of a time bar, nor did it toll the limitations period.

FACTS AND TRAVEL

This past year the Rhode Island courts likely heard legal arguments from hundreds of plaintiffs regarding insurance contracts and their terms and conditions. In one such case, an insured plaintiff pursued a petition in Superior Court to compel the insurance company to arbitrate a claim under the contract, despite the fact that the time limitation clause of the contract had apparently run its course some six years earlier.[1] In deciding that plaintiff had waited too long and that defendant had done nothing wrong, the Rhode Island Supreme Court agreed with the Superior Court, and the record of the case was remanded.[2]

In the summer of 1996, plaintiff National Refrigeration ("National" or "plaintiff") bought an insurance coverage plan from defendant The Travelers Indemnity Company of America ("Travelers" or "defendant") to insure its building, and any lost income and expenses arising from damages to the building.[3] The insurance contract included an appraisal clause, to be employed "if the parties could not reach an agreement" on the value of claims made under the policy.[4] Under these circumstances, the clause allowed either party to make a written demand for an appraisal, at which point both parties could select an appraiser, the two of

1. *See* Nat'l Refrig., Inc. v. The Travelers Indem. Co. of Am., No. KC/05-0107, 2007 WL 1658609 (R.I. Super. May 22, 2007).
2. *See* Nat'l Refrig., Inc. v. The Travelers Indem. Co. of Am., 947 A.2d 906, 912 (R.I. 2008).
3. *See id.* at 907-8.
4. *Id.* at 908.

which would select "an umpire."[5] Any difference in the appraisers' opinions as to the value of the loss would be submitted to the umpire, and "[a] decision agreed to by any two [would] be binding."[6]

The contract also included a limitations clause which stated that "[n]o one may bring a legal action against [defendant] under this Coverage Form unless: a. There has been full compliance with all of the terms of this Coverage Form; and b. The action is brought within 2 years after the date on which the direct physical loss or damage occurred."[7] The contract did not define "legal action."[8]

On June 22, 1997, plaintiff's Cybermation Machine[9] was damaged in an electrical storm.[10] Plaintiff made a claim with defendant for $102,951.54 to cover the replacement cost of a new Cybermation Machine.[11] In 1997 and 1998, defendant paid plaintiff $20,000.00 and $8,291.91, respectively.[12] Shortly thereafter, a dispute arose; plaintiff thought that it should be reimbursed for the full replacement cost of the machine, while defendant was under the impression that it was only responsible for the cost to repair the machine.[13]

This dispute was not revisited until 2002, when plaintiff requested that defendant reopen the investigation into their claim, as well as their loss of business claim.[14] Defendant agreed to do so, and in October denied the claims.[15] In July 2003, plaintiff again contacted defendant, requesting the higher replacement cost and reimbursement for the lost business.[16] Plaintiff also informed defendant that they were prepared to invoke the policy's appraisal clause if they could not come to an

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5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 910.
9. *See id.* at 908. A Cybermation Machine is "a machine used for cutting and fabricating ductwork in air cooling and heating systems."
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*

agreement on the amount.[17] Defendant responded to plaintiff's correspondence in August, again agreeing to investigate the claims but making it clear that doing so "in no way constituted a waiver of any defenses or rights to which defendant was entitled under the policy."[18] Later that month, defendant notified plaintiff that the claims were once more denied and "emphasized that it had informed the plaintiff in October 2002 that no additional payments would be made for the damage [. . .] and that the defendant's position had not changed."[19]

Plaintiff again contacted defendant in February 2004, requesting invocation of the appraisal clause in the contract.[20] Defendant denied this request, reminding plaintiff that the policy did not allow legal actions to be brought by those who have not complied with the terms of the contract, nor for those who wait more than two years from the date of the loss.[21] Plaintiff waited almost a year to file a petition for arbitration with the Superior Court "seeking to enforce the contract's appraisal clause."[22]

Both parties filed motions for summary judgment prior to the start of the trial.[23] Defendant argued that it was entitled to judgment as a matter of law because plaintiff's 2005 petition for arbitration constituted a legal action, barred by the contract's two-year limitations clause, which began to run in 1997 and expired in 1999.[24] The Superior Court judge agreed, granted defendant's motion for summary judgment and denied plaintiff's, adding that "the defendant's conduct had not tolled the policy's limitations clause, as the two-year period had expired long before defendant agreed to reopen the investigation into plaintiff's claims."[25] The trial court ruled that "the plain language of the contract between the parties foreclosed plaintiff from thereafter challenging the insufficiency of the reimbursement it had received for damages more than seven years earlier."[26] Plaintiff filed a timely appeal

17. *See id.*
18. *Id.*
19. *Id.*
20. *See id.*
21. *See id.*
22. *Id.*
23. *See id.*
24. *See id.* at 908-9.
25. *Id.* at 909.
26. *Id.*

with the Supreme Court of Rhode Island.[27]

On appeal to the Rhode Island Supreme Court, the plaintiff argued that the trial justice erred in granting defendant's motion for summary judgment.[28] Specifically, plaintiff argued that the contract's limitations provision, barring legal action after two years from the date of injury, did not apply to petitions for arbitration.[29] Defendant countered by arguing that a petition for arbitration is, in fact, a legal action, and therefore is barred by the limitations provision.[30] Plaintiff's alternative argument on appeal was that defendant should be estopped from being allowed to assert the limitations clause as a defense because defendant's conduct led plaintiff to believe that settlement was imminent, thus preventing plaintiff from filing a petition for arbitration on time.[31]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court reviewed the summary judgment decision of the Superior Court de novo. [32] First in its analysis, the Court noted that it construes contested insurance contract clauses in accordance with the general rules of contract law.[33] This rule of construction, the Court said, dictates that the parties' rights and liabilities to an insurance contract are to be "ascertained in accordance with the terms as set forth therein."[34] Secondly, the Court set forth its preference for "affording the terms of the policy their plain and ordinary meaning" and construing the terms with the "ordinary reader and purchaser in mind," not with the insurer's subjectively intended meanings.[35]

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27. *See id.*
28. *See id.*
29. *See id.*
30. *See id.*
31. *See id.* at 910-11. Note that plaintiff's alternative argument of impossibility is discussed later in this survey.
32. *See id.* at 909. This standard of review allows the Court to decide which party was entitled to prevail as a matter of law if it is clear, based on the pleadings, answers to interrogatories, admissions on file, and affidavits, that there is no genuine issue of material fact.
33. *See id.* (citing Metro Props, Inc. v. Nat'l Union Fire Ins. Co., 934 A.2d 204, 208 (R.I. 2007)).
34. *Id.* (citing DiIorio v. Abington Mutual Fire Ins. Co., 402 A.2d 745, 747 (R.I. 1979)).
35. *Id.* at 910. Here, the Court shows a willingness to favor the

Finally, the Court noted that it has already decided in several cases that limitations periods in insurance contracts are terms to which the Court will specifically bind the parties.[36]

The merits of plaintiff's contract construction argument were addressed first.[37] The Court examined the limitations clause language, which states that "'[n]o one may bring a legal action against us under this Coverage Form unless: * * * 'b. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.'"[38] Noting that the contract itself does not define "legal action," and that the Court has never before defined it, the Court decided that a petition for arbitration is squarely within the realm of a legal action.[39]

To support this conclusion, the Court turned to Black's Law Dictionary, which defines "action" in the following way:

An action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. But in some sense this definition is equally applicable to special proceedings. More accurately, it is defined to be any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree.[40]

Petitions for arbitration seek enforcement of a contract provision, which, if the petitioner is successful, result in the issuance of a court order directing the parties to arbitrate.[41] Therefore, a request for a court to adjudicate a claim is created when the petition is filed.[42] Because plaintiff's petition for arbitration is a legal action, the Court saw no other option but to

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reasonable, perhaps less legally sophisticated, party.

36. *See id.*

37. *See id.*

38. *Id.*

39. *Id.*

40. *Id.* (citing BLACK'S LAW DICTIONARY 31 (8th ed. 2004)).

41. *See id.* (citing R.I. GEN. LAWS § 10-3-4 (1956)).

42. *See id.* The Court drew out this logic by relying on the Black's Law Dictionary definition of "the similar term 'legal act,'" which is "[a]n action * * * that creates a legally recognized obligation; an act that binds a person in some way." (citing BLACK'S LAW DICTIONARY at 912). According to this definition, when the trial justice rules on a petition for arbitration, it is creating a legally recognized and enforceable obligation, making a petition for arbitration a legal action. *Id.* at 910.

hold that, by its terms, the limitations provision barred the petition, which was brought almost seven years after the electrical storm damaged the machine.[43]

Plaintiff's second argument on appeal was that defendant's behavior toward plaintiff barred defendant from invoking the limitations clause as a defense to the petition for arbitration, as defendant led plaintiff to believe that settlement was imminent.[44] Additionally, plaintiff alleged that the terms of the contract made it impossible to comply with the two-year time limit to bring suit.[45] The Court disagreed.[46]

In laying out the law of estoppel, the Court noted several circumstances where a party would be estopped from invoking the limitations clause as a defense due to the nature of the settlement negotiations.[47] These circumstances would have to be exceptional, and be accompanied by "certain statements or conduct calculated to lull the claimant into a reasonable belief that his claim will be settled without a suit."[48] Regardless of these guidelines, however, the Court had once before stated that negotiation settlements, without more, cannot serve as a valid basis for estoppel.[49]

On the facts before the Court, however, none of these exceptional circumstances were present.[50] When, in 1998, defendant allowed a reopening of the claim, it also rejected plaintiff's claim for more damages.[51] After this took place, plaintiff could have filed the petition for arbitration, which it had

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43. *See id.*
44. *See id.* at 910-11.
45. *See id.* at 911.
46. *See id.*
47. *See id.*
48. *Id.* (citing McAdam v. Grzelczyk, 911 A.2d 255, 259 (R.I. 2006)).
49. *See id.* There are two circumstances in Rhode Island jurisprudence that could, however, serve as a basis for estoppel, preventing the invocation of a limitations clause. First, if the insurance company says or does anything that assures the claimant of the imminence of settlement, and the claimant does not file on time because of the assurance, the insurance company is estopped from invoking the limitations clause when the claimant does file suit. Secondly, if the insurance company has "intentionally continued and prolonged the negotiations in order to cause the claimant to let the limitation period pass without commencing suit," the insurer is estopped from invoking the defense. *Id.*
50. *See id.*
51. *See id.*

until June 1999 to do, in light of the two-year limitations clause.[52] However, plaintiff waited until 2002 to contact defendant and ask again for a reopening of the claim, well after the two-year period had run.[53]

The Court addressed the argument that the letters from defendant agreeing to reopen the investigation constituted an attempt to improperly draw out the negotiations in an effort to prevent plaintiff from filing on time.[54] The Court squarely disagreed with this notion, noting that these agreements[55] to continue the investigation took place well after the two-year limit had run, in 2002 and 2003.[56]

To address plaintiff's allegation of impossibility of performance within the limitations period, the Court looked to plaintiff's argument that the Court was bound by its holding in an earlier case which held that a one-year limitations period had tolled. [57] Plaintiff's reasoning in that case was that, by the contract's terms, it would be impossible to act "diligently and in good faith to comply with the provisions of the policy with sufficient dispatch to enable him to bring suit within twelve months" after the loss.[58] However, the insurance contract in the present case, the Court held, was not impossible to carry out, nor was it impossible to file within two-years after the electrical storm.[59]

To conclude, the Court emphasized the policy rationale behind its decision to deny plaintiff relief, citing the need for finality.[60]

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52. *See id.*

53. *Id.* at 912.

54. *Id.* at 911.

55. The Court noted also that letters of this kind, agreeing to reopen investigations, do not constitute improper prolonging of negotiations, per its decision in *Hay v. Pawtucket Mutual Ins. Co.*, 824 A.2d 458, 460-61 (R.I. 2003).

56. *See id.* Defendant at no time led plaintiff to believe that settlement was imminent, before or after the two-year limitations period had passed, so there was no blame to be placed on defendant for plaintiff's almost eight-year late filing.

57. *See* Messler v. Williamsburg City Fire Ins. Co., 108 A. 832 (1920).

58. Nat'l Refrig., Inc. v. The Travelers Indem. Co. of Am., 947 A.2d 906, 911-12 (R.I. 2008) (citing *Messler*, 108 A. 832, 834 (1920)).

59. *See id.* at 912. Plaintiff merely failed to act diligently upon defendant's denial in 1997, after which plaintiff could have requested an appraisal, and if that too had been denied, it could have filed the petition.

60. *See id.* (citing Ryan v. Roman Catholic Bishop of Providence, 941

Strict enforcement of the limitations periods in contracts serves the best interest of the individuals who seek legal redress, and also those of society and the courts, who have a special interest in "'finality—for a closing of the books.'"[61]

The Court held that the Superior Court judge did not err in granting the defendant summary judgment.[62] The results of the case turned on the fact that plaintiff was too late to file its petition for arbitration under the contract's terms, and that defendant did nothing to prevent the contract's time limitation from running.[63] The decision of the lower court was affirmed.[64]

COMMENTARY

This decision is a fine example of a court attempting to do everything it can within its power to help out the proverbial little guy in a contractual situation. National Refrigeration,[65] the plaintiff, had gone to The Travelers Indemnity Company of America,[66] the defendant, to insure its building and business. Travelers enters into similar transactions every day, but such a transaction was a relatively rare occurrence for National.

Insurance contracts are contracts of adhesion, which are typically construed against the party who drafts them.[67] This is how the Rhode Island courts have dealt with them, as noted by the Court in this decision.[68] Construing contracts against the

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A.2d 174, 181 (R.I. 2008)). In *Ryan*, the Court "recognized that [...] statutes of limitation 'are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.*

61. *Ryan*, 941 A.2d at 181.

62. *See Nat'l Refrigeration*, 947 A.2d at 912.

63. *See id.*

64. *See id.* The record was remanded to the Superior Court.

65. According to National Refrigeration's website page entitled "About Us - Who We Are," the company employs over 100 people in several states, grossing over $20 million a year. *See* National Refrigeration, Who We Are, http://www.nhvac.com/whoweare.htm (last visited October 29, 2008).

66. According to the Travelers' website "Travelers at a Glance" page, the insurance company employs over 33,000 people and maintains about $115 billion in assets. *See* Travelers Insurance, Travelers at a Glance, http://www.travelers.com/iwcm/trv/docs /factsheet.pdf (last visited October 29, 2008).

67. *See* U.C.C. § 2-302 (2004); RESTATEMENT (SECOND) OF CONTRACTS §206 (1981).

68. *See Nat'l Refrigeration*, 947 A.2d at 910.

insurance company forces the insurance company to swallow any ambiguities, driving them to be the more responsible and careful party in the transaction.

The Court's theory seems to be that plaintiffs like National Refrigeration are bound to misread policies, infer erroneous lay meanings from legal wording, or not realize their rights and/or obligations under the contract. On the other hand, insurance companies like Travelers employ hundreds of attorneys devoted to writing and enforcing the policies. Thus, the Court allows more plaintiff missteps and gives plaintiffs a wide berth in construing these contracts. Under these circumstances, it seems next to impossible for a reasonable plaintiff, acting diligently and in good faith, to lose in Rhode Island courts on an insurance contract issue.

National, unfortunately, figured out how to lose. Their problem with punctuality apparently struck a chord with the Court.[69] National lost because they "sat on [their] right to commence" the petition for arbitration for almost eight years.[70] In contracts with limitations clauses, as in life, the early bird gets the worm; National was six years late and $74,659.63 short.

CONCLUSION

For the purposes of insurance contracts, petitions for arbitration are considered legal actions, which may be barred by time limits. Under Rhode Island law, defendant insurance companies, in agreeing to investigate claims they have already denied and deny again, are not acting improperly with the purpose of delaying the insured's timely filing of a legal action per the policy. While the state's jurisprudence may favor plaintiff insurance claimants generally, plaintiffs may not disregard strictly construed and socially beneficial time limitations.

Kelly E. Noble

69. *See id.* at 912.
70. *Id.*

Criminal Law/Family Law. *State v. Greenberg, et al.*, 951 A.2d 481 (R.I. 2008). The July 1, 2007 amendment to Rhode Island General Laws 1956 section 14-1-6, which was in existence for four months prior to being repealed, purported to transfer jurisdiction over seventeen-year-olds who had committed offenses that would otherwise be considered a felony or misdemeanor had an adult committed them, from Family Court to Superior and District Court. The Rhode Island Supreme Court held that the amendment did not waive jurisdiction over these individuals and that defendants who had been charged with felonies or misdemeanors under this amended law were guaranteed a hearing to determine if a waiver of jurisdiction from the Family Court was appropriate. The Court noted that because only two defendants were before it, it would not provide a decision for all juveniles who were affected by the amendment. It did however state that it would provide a framework to be applied to pending and adjudicated cases, and asked that the Public Defender and state attempt to resolve those cases based on the Court's holding.

FACTS AND TRAVEL

On July 1, 2007, the Rhode Island General Assembly amended General Law 1956 §14-1-6 in order to remove jurisdiction from Family Court over defendants who allegedly committed certain criminal offenses when they were seventeen years old.[1] When the crime committed would have been considered a felony had an adult committed it, jurisdiction was given to the Superior Court, while if the crime would be considered a misdemeanor had an adult committed it, jurisdiction was conferred upon the District Court.[2] Almost immediately after

1. State v. Greenberg, 951 A.2d 481, 485-86 (R.I. 2008).

2. *Id.* Article 22 of House Bill 2007-H 5300, Substitute A, entitled "An Act Making Appropriations For the Support of the State for the Fiscal Year Ending June 30, 2008" amended this law. The governor vetoed the bill, also known as the "Budget Bill." However, the House of Representatives overrode the veto and the Senate sustained the override. Though effective on June 21, 2007, all parties involved in this matter believed it became effective July 1,

the amendment went into effect, the Senate tried to "undo" it by passing the Senate Bill 2007-S1141 which would restore jurisdiction over these defendants to the Family Court.[3] However, because the House of Representatives had already recessed before it could vote on the Senate's measure, it was not until four months later, on November 8, 2007, that the Assembly was able to pass an amendment which placed jurisdiction over seventeen-year-olds back in Family Court.[4] During the four months when seventeen-year-olds were treated as adult offenders, known as the "gap period," a number of juveniles were arrested and charged with criminal offenses, including the defendants here.[5]

Defendants Ryan Greenberg (Greenberg) and Harold Chartier (Chartier) were seventeen years old at the time of their alleged offenses, and were among the juveniles referred to as the "gap kids" because they were arrested between the July and November amendments.[6] Greenberg was arrested and charged with murder in the second degree, as well as additional felony and misdemeanor offenses in the Superior Court.[7] Greenberg challenged the July and November amendments on constitutional grounds.[8]

While the trial court held that the legislation did not violate the state or federal constitutions, it ruled that the Family Court had retained original jurisdiction over the defendant and similarly situated juveniles.[9] The Superior Court held that the July Amendment had not modified certain jurisdictional prerequisites, specifically those that required the state to file a petition for a waiver of jurisdiction and that the Family Court waive its

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2007, so the court referred to the amendment as the "July amendment." *Id.* at n.4-5.

3. *Id.* at 487.

4. *Id.*

5. *Id.* at 488.

6. *Id.* at 484. (The defendants were involved in completely separate incidents and had separate trials. Their cases were consolidated at the Supreme Court level because they were both charged during the "gap period," but this is the only shared aspect of their cases. Any time this survey refers to the Superior Court opinion, this is regarding Greenberg. Any time the survey mentions the District Court opinion, it is regarding Chartier.)

7. *Id.* at 485.

8. *Id.* at 488.

9. *Id.*

jurisdiction on a case-by-case basis.[10] The judge ordered that any criminal informations and complaints pending in Superior Court be dismissed, but that any indictments, including the indictment against Greenberg, be held in abeyance pending waiver hearings in Family Court.[11] Both Greenberg and the state sought review of this decision on petition for certiorari and cross-petition for certiorari, respectively.[12] The case ultimately came to the Supreme Court on appeal.[13]

Defendant Chartier, separately, was arrested and charged with simple assault, a misdemeanor, in District Court.[14] The District Court judge ordered all pending misdemeanor complaints that were filed against any juvenile during the relevant period, including the defendant's, to be transferred to Family Court.[15] The judge also declared that he would grant, on an individual basis, motions to transfer to Family Court any adjudicated misdemeanor case that had been filed during the gap period in which the sentence had not been completed.[16] Chartier and the state both sought review of the decision.[17] Greenberg and Chartier's cases were consolidated for decision by the Supreme Court.[18]

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10. *Id.* (A petition for waiver is required under title 14 of the General Laws, entitled "Delinquent and Dependent Children.")

11. *Id.* The Superior Court decision declared that the decision applied to all defendants aged seventeen during the gap period. The Rhode Island Supreme Court rejected that portion of the decision, holding that it would not address the status of any defendant who was not appropriately before the Court. *Id.* at 484, n.3

12. *Id.* at 484.

13. *Id.*

14. *Id.*

15. *Id.* at 488.

16. *Id.* at 488-89. The Court noted that the District Court judge seemed to base this decision on §14-1-28, which requires the immediate transfer of any case to Family Court in which it is ascertained that the accused was under the age of eighteen at the time of the alleged offense. The District Court judge also grounded his decision on disparate treatment of juvenile offenders, finding that different prosecutions and punishments for juveniles based on when they were arrested created an impermissible classification. As with the Superior Court case, the Supreme Court held that those unnamed individuals were not before the Court and it would only rule on those defendants who were properly before the Court. *Id.* at 484, n.2

17. *Id.* at 484.

18. *Id.*

Standard of Review

When the Rhode Island Supreme Court reviews a case on certiorari, it is limited to an examination of "the record to determine if an error of law has been committed."[19] It does not weigh the evidence; rather it conducts its review only to examine questions of law raised in the petition.[20] When reviewing an appeal based on an alleged error of the law, the Court uses a de novo standard to determine if the trial justice committed legal error.[21]

It also uses a de novo standard when reviewing questions of statutory interpretation.[22] The Court held that it is the final arbiter in questions of legislative construction and it is the Court's responsibility to interpret an enactment and effectuate the Legislature's intent, and to attribute to the enactment the meaning most consistent with its policies or obvious purposes.[23] "If the language is clear on its face, then the plain meaning of the statute must be given effect, and this Court should not look elsewhere to discern the legislative intent."[24] Further, when the statute is unambiguous, the Court must apply the statute as written.[25]

ANALYSIS AND HOLDING

Family Court

Rhode Island's Family Court, created by statute, is a court of limited authority, with its authority restricted to those powers that the legislature confers upon it.[26] Because the Family Court's "authority over the welfare of children is among the court's core functions," the Supreme Court has "consistently, and jealously," protected the Family Court as a "sanctuary and critical refuge for

19. *Id.* at 489 (citing Gaumond v. Trinity Repertory Co., 909 A.2d 512, 516 (R.I. 2006)).
20. *Id.* (citing Malachowski v. State, 877 A.2d 649, 653 (R.I. 2005)).
21. *Id.* (citing State v. Jennings, 944 A.2d 171, 173 (R.I. 2008)).
22. *Id.* at 489 (citing Henderson v. Henderson, 818 A.2d 669, 673 (R.I. 2003)).
23. *Id.* (citing Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987)).
24. *Id.* (quoting Fleet Nat'l Bank v. Clark, 714 A.2d 1172, 1177 (R.I. 1998).
25. *Id.* (citing State v. DiCicco, 707 A.2d 251, 253 (R.I. 1998)).
26. *Id.* at 490.

the state's troubled children."[27] When a juvenile comes before the Family Court for committing a crime that would otherwise be considered a felony or misdemeanor, he or she gets the benefit of receiving a rehabilitative, rather than retributive, detention.[28] Because the Family Court's objective of rehabilitation is so important, and because that court is the child's last barrier from the adult justice system, the decision to waive jurisdiction over a defendant should not be taken lightly.[29]

The Rhode Island Supreme Court has recognized that the Family Court has exclusive personal jurisdiction over juveniles appearing before it on delinquency petitions, and that the only way Superior and District Courts are authorized to hear such cases is through a jurisdiction waiver.[30] Such a waiver must be adjudicated on a case-by-case basis.[31] The July amendment did not waive such jurisdiction; it merely expanded the instances in which the Family Court was mandated to waive its jurisdiction, assuming the waiver was in accordance with Chapter 1 of title 14.[32] The Court held that the defendants here should have been afforded probable-cause hearings and findings by the hearing justice that waiver of jurisdiction was appropriate and consistent with the statute.[33]

Waiver of Jurisdiction

A juvenile offender might be subject to the Family Court's waiver of personal jurisdiction in several kinds of situations.[34] The Attorney General may motion the Family Court to waive

27. *Id.*
28. *Id.* at 490-91.
29. *Id.* at 491. The Court explains the long-lasting consequences of a waiver of jurisdiction: "the child no longer will remain at the Rhode Island Training School, and he or she may face imprisonment in a high-security facility, alongside the state's most hardened felons. For these reasons, the Family Court's waiver of jurisdiction over a child accused of conduct that would be criminal if committed by an adult should be critically examined and cautiously decided."
30. *Id.* Section 14-1-40(a) of title 14 of General Laws states that Superior Court has general jurisdiction but it lacks personal jurisdiction over juveniles accused of committing criminal conduct.
31. *Id.*
32. *Id* at 491-92.
33. *Id.* at 492.
34. *Id.* at 492-93

jurisdiction over a juvenile based on either the age of the juvenile or the gravity of the alleged offense.[35] Specifically, if the juvenile is accused of an offense that is punishable by life imprisonment if committed by an adult, or is sixteen years old or older when charged with an offense that would be considered a felony if committed by an adult, the Family Court "shall" conduct a hearing to determine whether or not it should waive jurisdiction.[36]

There is no statute or rule of waiver dealing with juvenile conduct that would be considered a misdemeanor if an adult committed it.[37] The Court affirmed the portion of the District Court order that directed the transfer of Chartier's case to Family Court.[38] Further, with respect to any District Court case that was pending where a juvenile was charged with misdemeanor conduct, the Court held that the case shall be transferred to Family Court and adjudicated as a wayward petition.[39]

Felony Cases

The Rhode Island Supreme Court noted that the Family Court did not conduct a waiver hearing for Greenberg and the fact that the indictment was not filed prior to the November amendment becoming law controlled the results in the case, based on the Court's recent holding in *State v. Jennings*.[40] In *Jennings*, the Court dealt with the question of whether the Superior Court or the Family Court had jurisdiction over violations of a law where a jurisdictional statute was amended, subsequent to the defendant's arrest but before the Attorney General filed a criminal information in the Family Court.[41] After the statute was amended and the Family Court was divested of jurisdiction, the defendant's case was removed to Superior Court, which the state appealed, arguing that the Family Court retained jurisdiction over the defendant because it was pending there when the statute was amended.[42] There, the Court held that because the state had

35. *Id.* at 493.
36. *Id.* (citing R.I. GEN. LAWS §§14-1-7(a), 14-1-7(b) (2007)).
37. *Id.* at 493.
38. *Id.*
39. *Id.*
40. *Id. at* 493-94 (citing State v. Jennings, 944 A.2d 171, 173 (R.I. 2008)).
41. *Id.* at 494.
42. *Id.*

failed to file a criminal information in Family Court before the effective date of the amendment, the case was not pending in Family Court and jurisdiction had been vested in Superior Court.[43] The Court held that its resolution in *Jennings* did not turn on a retroactive versus prospective application of the legislative enactment, but rather it held that because a prosecution for a crime must be preceded by a formal accusation,[44] the operative filing in that case was a charge by information.[45] A felony complaint alone is insufficient.[46]

The Court noted that while Greenberg was the only defendant properly before it who had been charged with a felony, there were numerous seventeen-year-old offenders who had been arrested and were prosecuted in the Superior Court pursuant to the July amendment.[47] It stated that because the Family Court was not divested of its jurisdiction by the July amendment, such individuals were entitled to a hearing in Family Court and a judicial determination of whether a waiver of the Family Court's jurisdiction over them is appropriate.[48]

The Court further noted that Greenberg's indictment was being held in abeyance as opposed to being dismissed because there was no legal distinction between an indictment and a criminal information.[49] Greenberg argued before the Court that under the common-law rule of abatement, when a penal statute is repealed without a savings clause, "all criminal proceedings instituted thereunder abate," and therefore that his indictment should be abated.[50] The Court found, however, that because it was dealing with a jurisdictional amendment, not a penal statement amendment, abatement was not the answer: "when a trial justice determines that original subject-matter jurisdiction over an offense resides in another court within our unified court system, he or she shall order the case transferred to that Court."[51]

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 495
51. *Id* at 495-96. (In *State v. Boucher*, 468 A.2d 1227 (R.I. 1983), the defendants were charged with the felony of habitual cruelty to a child, which

The Court held that *State v. Mastracchio,*[52] where a seventeen-year-old defendant was convicted of homicide in Superior Court, was controlling.[53] There, the Court refused to vacate the defendant's conviction and remanded the case to Superior Court with directions to determine whether the Family Court would have waived jurisdiction over the defendant because Superior Court is a court of general jurisdiction over felonies.[54] Accordingly, it must be determined whether the Family Court would have waived jurisdiction over Greenberg rather than having his case be dismissed.[55]

Adjudicated Cases

In the District Court decision, the trial judge stated that he would entertain and grant a motion to transfer to the Family Court any adjudicated case of a defendant who was sentenced in the adult penal system under the July amendment of the statute if the sentence or probationary term had not been completed.[56] The Court held that this was error.[57] It held that cases where final judgments were entered cannot be subject to transfer to another court, unless a conviction is vacated.[58]

The Court also addressed the portion of the November amendment regarding the manner in which court records were to

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was transferred to Family Court, though the trial court refused to transfer the accompanying misdemeanor counts to District Court. The Supreme Court vacated the defendants' convictions and ordered that the case be transferred to District Court because after the felony charge was transferred to Family Court, the Superior Court no longer retained jurisdiction over the misdemeanors; instead the District Court had jurisdiction over the case. In *State v. Sickles*, 470 A.2d 220 (R.I. 1984), the defendant was convicted of the misdemeanor offense of willful and malicious injury to property in Superior Court. The Supreme Court vacated the conviction and ordered that the case be transferred to District Court, which had original jurisdiction over misdemeanor offenses. In *In Re* Edward, 441, A.2d 543 (R.I. 1982), the Court held that the Family Court lacked subject matter jurisdiction over the defendant and because no other court had jurisdiction over a petition for delinquency, the case had to be dismissed.)

52. *Id.* (citing State v. Mastracchio, 546 A.2d 165, 168 (R.I. 1988)).
53. *Id.* at 496. (citing *Mastracchio*, 546 A.2d at 168.
54. *Id.*
55. *Id.*
56. *Id.* at 496.
57. *Id.*
58. *Id.*

be maintained for cases prosecuted under the July amendment where final judgments had been entered.[59] The legislature stated that all court records from such cases shall be sealed, including sentence, probation and parole records.[60] The Court held that the legislature overstepped its powers and did not have the authority to exercise legislation like this that purports to affect court judgments.[61]

Finally, the Court held that because no cases were brought on behalf of any person whose case was adjudicated, those adjudicated cases were not actually before the Court.[62] The remedy of postconviction relief is available to such defendants.[63]

COMMENTARY

The July and November amendments to General Laws 1956 section 14-1-6 were widely publicized legislation that affected many people throughout Rhode Island. It is apparent that both of the trial court justices in this case, Judge Daniel A. Procaccini of the Superior Court and Chief Judge Albert E. DeRobbio of the District Court, tried to render decisions that would affect *all* individuals who had been charged with misdemeanors or felonies under the short-lived statute. While Judge Procaccini laid down an opinion that would affect all pending cases, Judge DeRobbio went even further and stated that he would grant transfers to Family Courts in cases where final judgment had already been entered.

The Court made a point to explicitly state that its decision only applied to the two named defendants who were properly before the Court. However, the Court did appreciate the fact that these defendants were not the only individuals affected and stated that it would provide a framework that could be applied to felony and misdemeanor cases involving other "gap kid" individuals.[64] The Court asked the Public Defender and the state to attempt to resolve the other cases by stipulation and agree on those that may

59. *Id.*
60. *Id.* at 497 (citing R.I. GEN. LAWS § 14-1-6.1(a)(ii) (2007)).
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 490.

be adjudicated in the Family Court.[65] Further, with respect to any case that the Attorney General files a motion pursuant to chapter 1 title 14, the Court stated that a waiver hearing shall be scheduled in the Family Court as soon as is practicable.[66]

The Court's ruling was well received by the defendants and similarly situated juveniles. John J. Hardiman, the chief public defender said that he was "very pleased" with the Court's ruling because it "puts the cases back where they belong in Family Court and it gives [seventeen-year-old defendants] the same due process that any other child would have received prior to enactment of the initial legislation."[67] Attorney General Patrick C. Lynch stated that the decision was "unsettling" for the victims of felony offenses, but seemed to suggest that the problem lay with the legislature for making an uninformed legislative decision and not the Court's ruling on the matter.[68]

CONCLUSION

As stated above, the Court affirmed in part and vacated in part the trial court decisions. Regarding Defendant Greenberg, the decision that held his Superior Court indictment in abeyance pending a Family Court waiver was affirmed. The Court declined to address or issue an opinion as to the remainder of the Superior Court case and order.[69] Regarding Defendant Chartier, the Court affirmed the portion of the District Court's decision and order that transferred the case against the defendant to Family Court but vacated the portion which stated that the District Court would address any case in which final judgment has been entered.[70] The cases were remanded to Superior and District Court, respectively.[71]

Jessica Schachter

65. *Id.*
66. *Id.*
67. Edward Fitzpatrick, *'Gap Kids' fate to be decided in Family Court*, The Providence Journal, July 11, 2008 at 1.
68. *Id.*
69. State v. Greenberg, 951 A.2d 481, 497 (R.I. 2008).
70. *Id.*
71. *Id.*

Criminal Law. *State v. McManus*, 941 A.2d 222 (R.I. 2008). A defendant convicted of first-degree murder may be sentenced to life in prison without the possibility of parole regardless of whether the crime is classified as among the most heinous, so long as the Court finds that aggravated battery or other aggravating factors occurred during the killing. Also, a defendant is not entitled to have a prosecutor removed from the case because the defendant threatened the prosecutor's life. Further, a defendant is not entitled to a new trial when the state failed to provide evidence not material to the defense, the state did not have intent to deceive, and the defendant knew or should have known all of the evidence in question. Finally, a mistrial is not clearly warranted when a prosecutor asks a witness a question that is so inappropriate as to prejudice the jury.

FACTS AND TRAVEL

A Washington County jury convicted Joseph McManus Jr. of first-degree murder for killing his wife Kelly and sentenced him to life imprisonment without the possibility of parole.[1] The facts of the case detail an extremely violent relationship highlighted by numerous threats of bodily harm and death on the part of the defendant toward his wife.[2] However, central to the Rhode Island Supreme Court's opinion are the moments prior to death – found by the jury to have constituted aggravated battery and torture.[3] These findings formed the basis of the sentence which was the main issue on appeal, and which prompted one dissenting vote.[4]

McManus and Kelly had a longstanding relationship, producing three children, but a short marriage.[5] Witnesses

1. State v. McManus, 941 A.2d 222, 225 (R.I. 2008).
2. *See id.* at 225-226.
3. *See id.* at 226. The torture issue was ultimately not reached on appeal. *Id.* at 236.
4. *See id.* at 228. Appellant appeared pro se and all of his personal arguments were flatly rejected by the Court. The final issue – whether his crime deserved life without parole – was argued by his standby appellate counsel. *See id.*
5. *Id.* at 225.

testified to the violent tendencies of the defendant against his wife.[6] Some of the threats and violence that witnesses testified to stemmed from the defendant's suspicions that Kelly was having an affair.[7] Eventually, Kelly forced the defendant to leave the family's home.[8] However, McManus returned, simultaneously pleading for Kelly to take him back and threatening her life if she did not.[9] After she refused to admit him back, the defendant made his way into the house and stabbed her numerous times.[10] Throughout the event, all of the McManus children were inside or immediately outside of the home.[11] Indeed, the eldest son at one point sought to help his mother by striking his father with a coffee table.[12]

The assistance was too late; Joseph McManus had stabbed Kelly six times, puncturing her heart and lungs.[13] The McManus children called emergency services for help, but Kelly ceased breathing and was later pronounced dead.[14] In the meantime, police found McManus nearby.[15] He had cuts on his wrists and was repeating, "I'm sorry."[16]

While McManus was awaiting trial in jail, a confidential informant alerted prosecutors that McManus was attempting to solicit the murder of Kelly's lover, Keith Knapton, as well as the Attorney General and a prosecutor in the case.[17] McManus was later charged with solicitation of murder.[18]

McManus was convicted of first-degree murder for the death of his wife.[19] The jury sentenced him to life in prison without the

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6. *Id.*
7. *Id.* McManus' suspicions seemed to be correct. The alleged lover, Keith Knapton, admitted to a sexual relationship with Kelly in a written statement. *See id.* at 228.
8. *Id.* at 226.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 224. McManus cut the home's telephone line, making it all the more difficult for the children to get help for their mother. *Id.*
14. *Id.* at 226-27.
15. *Id.* at 227.
16. *Id.*
17. *Id.* at 228.
18. *Id.* at 228-29.
19. *Id.* McManus mounted a diminished capacity defense at trial, but did not appeal any issues specifically relating to this defense. *See id.* at 225.

possibility of parole.[20] McManus appealed this conviction.[21]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court addressed four arguments, which McManus brought pro se, as well as one contention of error argued by his standby appellate counsel.[22] The Court unanimously rejected the four pro se arguments. However, on the fifth issue, the majority affirmed, but Justice Flaherty dissented.[23]

Discovery

First, McManus argued that prosecutors in his first case withheld a transcript of a police interview of Kelly's lover, Keith Knapton, taken during McManus' second case.[24] He claimed that withholding this piece of evidence violated Rule 16 of the Rhode Island Rules of Criminal Procedure and the Federal Due Process Clause under *Brady v. Maryland*,[25] and that he was thus entitled to a new trial.[26]

The Court explained that the purpose of both Rule 16 and *Brady* is to provide the defendant with a fair trial and to reduce the element of surprise at trial.[27] If a defendant requests that the state provide information favorable to the defendant's case, then the state is required to comply so long as the evidence sought is material.[28] A defendant's due process rights may also be violated if the prosecutor withholds information in bad faith, regardless of the materiality of the evidence withheld.[29] The Court stated that the standard for overturning a trial court's denial of a new trial, based on a Rule 16 or *Brady* violation was clear error.[30]

Here, the trial court had previously denied the new trial

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20. *Id.*
21. *Id.* at 225.
22. *Id.* at 228.
23. *Id.* at 238.
24. *Id* at 228. Although McManus sought this particular transcript, he was in possession of an earlier statement made by Knapton. *Id.*
25. 373 U.S. 83 (1963).
26. State v. McManus, 941 A.2d 222, 229 (R.I. 2008).
27. *Id.*
28. *Brady*, 373 U.S. at 87.
29. *Id.*
30. *McManus*, 931 A.2d at 229.

motion based on the nondisclosure claim and thus the Supreme Court could only overturn the decision if the trial court committed clear error. [31] The Supreme Court found that the state had not deliberately withheld the transcript from McManus, partly because McManus could not show that the prosecutor had the transcript during the first case or that the prosecutor had provided similar information which would tend to show an intent to keep the evidence secret.[32] Secondly, the evidence was not material because it did not obviously bear on McManus' claim of diminished capacity.[33] Also, the Court stated that the defendant knew or should have known about the facts contained in the withheld evidence.[34] Thus, the Supreme Court held that McManus was not entitled to a new trial.[35]

Disqualification of the Prosecutor

Second, McManus argued that a prosecutor in his first case should have been disqualified.[36] Although the Court stated that the precise issue on appeal was of first impression, it made short work of McManus's argument.[37]

McManus claimed that the disqualification was necessary because he was alleged to have solicited a contract on the prosecutor's life.[38] The Court rejected this claim, citing an Indiana case[39] with facts "strikingly similar" to McManus's case, reasoning that allowing the defendant to prevail would encourage criminal defendants in general to threaten their opponents in

31. *Id.* at 229.
32. *Id.* at 231.
33. *Id.*
34. *Id.* The trial justice concluded that the transcript only included information such as the defendant's and Knapton's relationships with Kelly and the defendant's state of mind prior the murder. *Id.*
35. *Id.*
36. *Id.* at 231. The Court logically pointed out that, without proof that the prosecutor had the disputed evidence at the time the defendant alleges it was withheld, any attempt to claim the transcript was withheld would be fruitless. *See id.*
37. *See id.*
38. *Id.* at 228.
39. Kindred v. State, 521 N.E.2d 320, 327 (Ind. 1988) (defendant not entitled to special prosecutor after he was alleged to have threatened to kill the prosecutor; no conflict of interest present).

order to gain an advantage.[40]

Conflict of Interest

Third, McManus claimed a conflict of interest existed between his trial counsel and the state, amounting to a violation of his right to effective counsel.[41] However, the Court did not address the substance of the claim because it held that McManus should have argued the point in a post-conviction hearing or at trial.[42] Without either of these events, the Supreme Court was unable to review the claim for error because the claim was not ripe.[43]

Inappropriate Question by Prosecution

Fourth, McManus claimed that the trial justice committed error by not ordering a mistrial after the prosecutor asked an inappropriate question on redirect examination of a testifying officer.[44] The prosecutor asked the officer: "Do you know of any law in the State of Rhode Island that says if you have blood alcohol level of .10, you can't go out and kill somebody?"[45] The question was asked in response to inquiries on direct and cross-examination regarding the presence of alcohol and drugs in McManus' blood immediately after his wife's murder.[46] McManus objected and the trial justice ordered that the question be stricken.[47] However, the trial justice found the comment "not so inappropriate or prejudicial to taint the jury."[48]

On review, the Supreme Court analyzed the issue under the clearly erroneous standard.[49] Upon reviewing the record, the Court held that the question was inappropriate, but not so much so that it warranted a mistrial.[50]

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40. State v. McManus, 941 A.2d 222, 232 (R.I. 2008).
41. *Id.* at 233.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 234.
48. *Id.* at 233.
49. *Id.* at 234.
50. *Id.*

Life Imprisonment Without Possibility of Parole

The central challenge posed by the McManus defense was that the facts underlying the crime of first-degree murder were not such to support a sentence of life in prison without the possibility of parole.[51] The majority disagreed, holding that the jury was reasonable in finding the murder involved an aggravated battery and that finding was sufficient to warrant the punishment.[52]

The Court explained that the rule for upholding a jury decision to sentence a criminal defendant to life without parole was governed by the presence of certain aggravating factors – specifically, the murder must have included facts supporting aggravated battery, torture or other criminal acts.[53] However, the Supreme Court's de novo review is broader than just affirming the presence of an aggravating factor.[54] The Court seeks instead to "determine the appropriateness" of the sentence.[55] Moreover, the Court will look at mitigating factors.[56]

In this case, the Court found several aggravating factors. First, the Court noted that the defendant had threatened his wife for weeks leading up to her death.[57] Also, the facts showed that McManus committed the murder in the presence of the couple's children.[58]

Most crucial, however, was the Court's analysis of the term aggravated battery itself, which to the Court meant inflicting injury beyond that which is necessary to kill or render the victim helpless.[59] In this case, the Court determined that McManus' continuous stabbing constituted aggravated battery because it was more force than necessary to kill Kelly or render her unable to

51. *See id.*
52. *Id.* Because the majority determined the aggravated battery element was properly found by the jury, the Court did not examine whether the murder involved torture, which the jury also found. *Id.* at 236.
53. *See id.* at 234. The Court notes that there are seven aggravating factors that may make a murder eligible for life without possibility of parole. *See id.*
54. *See id.* at 235.
55. *Id.*
56. *Id.*
57. *Id.* at 236.
58. *Id.*
59. *See id.* (citing State v. Travis, 568 A.2d 316, 323 (R.I. 1990)).

resist him.[60]

The defendant's primary argument against the imposition of life without parole was that death by stabbing, without more, should fall below the level of the particularly heinous crimes reserved for the state's ultimate punishment.[61] Here, the Court divided. The majority dismissed the argument by reasoning that just because other more heinous crimes have been committed does not necessarily preclude McManus's crime, even if less heinous, from meeting the same fate.[62]

Justice Flaherty filed a brief dissenting opinion on this issue.[63] He stated that there was a narrow class of cases to which life without parole is an available punishment.[64] This case, Flaherty reasoned, was simply not within that group.[65] To get the ultimate punishment, one must commit a murder more brutal than McManus' crime.[66]

COMMENTARY

The majority saw the sentence of life without parole as one available whenever one or more of the various factors are found as noted above.[67] The dissent, on the other hand, saw the factors above as crucial, but would have still limited the sentence to only those murder convictions which had substantively more brutal underlying facts.[68]

Further, although it is apparent the two sides disagreed as to the legal requirements for the state's harshest sentence, it is also apparent that the majority and dissent disagreed as to the nature of this particular crime. The majority went to great pains to deplore the stabbing.[69] On the other hand, although the dissent did not explicitly downplay the conduct of the defendant, it is clear

60. *Id.*
61. *See id.* at 237.
62. *Id.* at 237-238.
63. *Id.* at 238 (Flaherty, J., dissenting).
64. *Id.* at 239.
65. *Id.*
66. *See id.*
67. *See id.* at 237.
68. *See id.* at 239 (Flaherty, J., dissenting).
69. *See id.* at 224 ("heinous and horrific"); *id.* ("[Kelly McManus] endured excruciating pain and terror"); *id.* at 236-237 ("we pause to note with disgust how truly heinous was the murder of Kelly...").

that Justice Flaherty could not lump a domestic stabbing with other more graphic and horrifying murders.[70]

There is clearly a distinction in depravity between the murder of Kelly McManus and other murders the Rhode Island Supreme Court has recently upheld for life without parole.[71] However, it is unclear if that distinction matters. Here, McManus apparently attempted a diminished capacity defense at trial, perhaps believing that the facts of his case could not result in a sentence of life without parole.[72] Perhaps he was justified in this belief; one could reasonably conclude that McManus' conduct indicated that he was deranged, but he did not take the further steps often indicative of a heinous crime such as sexual abuse or crude destruction of a body.

Moreover, the majority seemed to stretch the aggravated battery factor, which can be present upon rendering a part of the body inoperative or going beyond what is necessary to render the victim helpless, to the extreme.[73] Under this formulation, the aggravated battery factor would be present in any first-degree murder case, excluding those involving only one gun shot or a single fatal blow. Thus, this liberal interpretation could make almost every murder conviction eligible for life without parole.

This broad reading is especially problematic for criminal defendants, who must make the important decision of whether to argue a difficult defense to a jury or plead guilty prior to trial in hopes of receiving a lighter sentence. Without knowledge of the standard by which their conduct will be judged, those defendants will be unable to make an informed decision. It may also be the case that the *McManus* decision has effectively made that decision for those defendants: nearly every first-degree murder conviction may be subject to life without parole. Thus, it would be foolish for defendants to hope they are insulated from such harsh punishment.

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70. *See id.* at 239. Justice Flaherty did not cite any cases or give any examples of crimes deserving life without possibility of parole.

71. *See, e.g.*, State v. Motyka, 893 A.2d 267, 291 (R.I. 2006) (first-degree murder and sexual assault of 66 year-old woman in her home).

72. *See* State v. McManus, 941 A.2d 222, 225 (R.I. 2008). McManus did not confess to the crime but, as noted above, he did not contest that he had killed Kelly. Thus, his trial was primarily focused on his sentence if his diminished capacity defense did not prevail.

73. *See id.* at 236.

CONCLUSION

The sentence of life without the possibility of parole is available to any convicted first-degree murderer if the jury finds an aggravating factor. Although one Justice on the Rhode Island Supreme Court believes life without parole should be left to a narrow group of cases standing for the most brutal or heinous, it is clear from this case that either a majority of the Court completely disagrees with this view of the law, or sees most murders as falling into this ever-broadening category.

Timothy L. Cook

Criminal Law. *In re Richard A.*, 946 A.2d 204 (R.I. 2008). The evidence against Respondent was sufficient to support juvenile delinquency adjudication on the charge of second-degree child molestation. In addition, the Sex Offender Registration and Community Notification Act ("Registration Act"), as applied to juvenile sex offenders, does not impinge on the confidentiality of juvenile proceedings. Finally, the Registration Act's requirement that a juvenile adjudicated delinquent must register as a sex offender does not give rise to a constitutional right to a jury trial.

FACTS AND TRAVEL

Respondent appealed his delinquency adjudication following a bench trial for the second-degree child molestation[1] of his 9-year-old cousin Jennifer[2] in 2003.[3] Both Respondent and Jennifer, along with their juvenile cousin Junior, were lying on the floor in Jennifer's grandmother's spare room when Jennifer alleged that Respondent sexually assaulted her.[4] Jennifer testified that Respondent placed his hands inside her underwear, touched her breasts underneath her shirt, and placed her hand inside his underwear.[5] In addition, Jennifer claimed that there were at least two additional occasions when she was sexually assaulted by Respondent.[6] As is routine in juvenile proceedings, a trial justice in Family Court, sitting without a jury, decided the case.[7] The trial justice decided that Jennifer was a very credible witness and adjudged Respondent delinquent on the charge of second-degree child molestation.[8]

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1. R.I. GEN. LAW §11-37-8-3 (1956) (provides "A person [commits] second-degree child molestation sexual assault if he or she engages in sexual contact with another person fourteen (14) years of age or under.")
2. Jennifer is not the real name of the victim.
3. *In re* Richard A., 946 A.2d 204, 206 (R.I. 2008).
4. *Id.*
5. *Id.*
6. *See id.* at 207.
7. *Id.* at 208.
8. *Id.*

ANALYSIS AND HOLDING

Respondent made three contentions on appeal to the Rhode Island Supreme Court: (1) There was insufficient evidence to support the delinquency adjudication; (2) the Registration Act compromises the confidentiality inherent in the juvenile justice system; and (3) the Registration Act's non-confidential and punitive nature renders the delinquency adjudication equivalent to an adult criminal conviction, thereby giving Respondent the right to a trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution and article 1, sections 2 and 10 of the Rhode Island Constitution.[9]

Sufficiency of Evidence

The Rhode Island Supreme Court gives great deference to the Family Court when reviewing juvenile delinquency adjudications.[10] The Court will only intervene when there is no "legally competent evidence" to support the findings of the trial justice, the trial justice has overlooked or misconceived material evidence, or was otherwise clearly wrong.[11] The Court has also afforded high regard to credibility determinations made by a trial justice, so long as those determinations were reasonable, logical, and flowed from established facts.[12]

Confidentiality of Juvenile Justice System

The Rhode Island Supreme Court has historically given great discretion to the Rhode Island General Assembly and will only invalidate legislation that "palpably and unmistakably could be characterized as an excess of legislative power."[13] In fact, the party challenging the legislation must show that it violates a specific provision of either the Federal Constitution or the Rhode Island Constitution *beyond a reasonable doubt.*[14] Contrary to the punitive character of the adult justice system, the confidentiality

9. *Id.* at 209.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 211 (quoting City of Pawtucket v. Sundlun, 662 A.2d 40, 44-45 (R.I. 1995)).
14. *Id.* (citing Cherenzia v. Lynch, 847 A.2d 818, 822 (R.I. 2004)).

of the juvenile justice system serves to promote the primary goals of protection, rehabilitation, and treatment of juvenile offenders.[15] However, the juvenile system's confidential nature is "not absolute," and may be relaxed if outweighed by a legitimate public concern.[16]

The intention of the Rhode Island General Assembly when it enacted the Registration Act and made it applicable to juveniles, thereby requiring them to register their home addresses with their town's police department, was to protect the public, not to punish the juvenile offender.[17] This is despite the Act's incidental inconveniences and potential burdens to juvenile sex offenders.[18] Those burdens are outweighed by the need of police departments to have at their disposal the home addresses of all sex offenders within the town.[19] Moreover, the Court pointed out that the juvenile sex offender's information is not released to the public, further lessening any potential inconvenience or burden.[20]

Right to a Jury Trial

The United States Supreme Court has held that federal Due Process rights do not guarantee the right to a jury trial in the adjudicative phase of a state juvenile-delinquency proceeding.[21] Furthermore, the Rhode Island Constitution has been interpreted to mean that a juvenile delinquent is not entitled to a jury trial.[22] The Respondent's argument that this particular delinquency adjudication is different because it requires him to register as a sex offender was not persuasive to the Court.[23] Other jurisdictions have already determined that, because the registration requirement is primarily for protecting public safety, it is not punitive.[24] Further, because the requirement is not punitive, it does not give rise to a right to a trial by jury, which

15. *Id.* at 210.
16. *Id.* at 212.
17. *Id.* at 213.
18. *Id.*
19. *See id.* at 214.
20. *Id.*
21. *Id.* at 212.
22. *Id.*
23. *Id.* at 213.
24. *Id.*

would normally be afforded a defendant in the adult criminal justice system.[25]

In response to Respondent's three arguments, the Court held that (1) the trial justice did not act unreasonably in concluding that there was sufficient evidence to adjudicate Respondent delinquent on the charge of second-degree child molestation; (2) the Registration Act does not compromise the confidential nature of the juvenile justice system because its purpose is protecting the public, not punishing the juvenile; (3) and because the Act's registration requirements are not punitive, Respondent is not entitled to a jury trial under either the Federal or Rhode Island Constitution.[26]

COMMENTARY

The Court's decision walks a very fine line between the constitutional rights of a juvenile offender and the constitutional rights of an adult offender. The issue is whether requiring a juvenile sex offender to register his name and address with police, which adult sex offenders are also required to do under the Registration Act, strips the juvenile proceeding of its confidential nature, and places it within the adult system, thereby giving the juvenile a right to a trial by jury. The Court's answer to this question is no.

The Registration Act does impose the same requirements on juvenile sex offenders as it does on adult sex offenders, *but only for the purposes of public safety.* The Court reasons that in order for a proceeding to be "pulled" out of the juvenile system and placed within the adult system, there would have to be some punitive element imposed on the juvenile offender that would also be imposed on adult offenders. However, the Registration Act does not impose any punishment at all; it merely requires registration with police in order to further the ability of public safety officials to track sex offenders. Without a punitive provision within the Registration Act, there is no reason for the juvenile proceeding to be placed within the adult criminal justice system. Consequently, because the proceeding remains in the juvenile justice system, the Respondent is not entitled to a trial by

25. *Id.*
26. *Id.* at 214.

jury.

CONCLUSION

The Court held the Registration Act, as applied to juveniles, was constitutional under both the Federal and Rhode Island Constitutions. The Registration Act neither destroyed the inherent confidentially of the juvenile justice system, nor imposed any punishment on the juvenile sex offender. The Registration Act was specifically enacted by the Rhode Island Legislature to protect the public, and that concern outweighs any inconvenience or burden to the sex offender. Given that there are no punitive consequences, juvenile sex offenders who are required to register their home addresses under the Registration Act are not entitled to the jury trial afforded defendants in the adult criminal justice system.

Michael Edwards

Criminal Procedure/Evidence. *State v. Barkmeyer,* 949 A.2d 984 (R.I. 2008). Where an individual conducts a private search in their own home and consent is given to a police officer to come into the home to collect evidence, the Fourth Amendment has no application. The Sixth Amendment right to a public trial is not violated when a trial justice closes the courtroom to unnecessary personnel before a victim testifies about child molestation, and where no one was actually excluded. A statement is admissible and not considered hearsay if it is used by a declarant as a prior consistent statement to rebut an allegation of improper influence on the part of the declarant. Finally, prejudicial statements made by a prosecutor in closing arguments can be remedied by a comprehensive limiting instruction by the trial justice.

FACTS AND TRAVEL

On May 22, 2004, while Jennifer Barkmeyer (hereinafter, "Jen") was bathing her 8-year-old daughter Jane, Jen noticed blood in Jane's underwear.[1] When the bleeding continued, Jen consulted a pediatrician who found bruising in Jane's vaginal area and, suspecting sexual abuse recommended they visit a hospital.[2] "The pediatrician also notified the Department of Children, youth, and families (DCYF) about his suspicion that Jane had been molested" and DCYF assigned Laurie Houle (hereinafter, "Houle") to the case.[3] When Jen called Ronald Barkmeyer (hereinafter, "Defendant") – her husband and Jane's stepfather - to tell him about the pediatrician's findings, he said "they're going to suspect me."[4]

The family arrived at the hospital on May 25, 2005, where Defendant told Houle that he had not harmed Jane in any way.[5]

1. *State v. Barkmeyer,* 949 A.2d 984, 989 (R.I. 2008). To protect the privacy of the victim, she was given a false name.
2. *Id.*
3. *Id.* at 989-90.
4. *Id.* at 990.
5. *Id.*

Jane was examined by Dr. Amy Goldberg (hereinafter, "Dr. Goldberg").[6] "During the examination, Jane indicated to Dr. Goldberg that she had been touched in her pee-pee with a finger."[7] Dr. Goldberg determined that the injuries to Jane's genitals that were so severe that they required surgery to fix the damage.[8] Subsequent to the surgery, detective William Swierk (hereinafter, "Detective Swierk") was notified of the suspected sexual molestation and went to the hospital to speak to Jane, Jen, and Dr. Goldberg about the incident, where he was told by Jane that she was "tied up with a rope" during the assault.[9]

"Defendant was subsequently arrested and charged with one count of first degree child molestation sexual assault, in violation of R.I. GEN. LAWS § 11-37-8.1 (1956) and R.I. GEN. LAWS § 11-37-8.2 (1956)."[10] Subsequent to the arrest, Jen's father, William Wilson (hereinafter, "Will") and his wife Barbara came to Rhode Island from California to provide Jen with support; they stayed in Jen's home.[11] Pursuant to instructions from Jen, both Will and Barbara helped her throughout the ordeal by cleaning the house and packing Defendant's belongings so they could be shipped to Marine barracks.[12] Several days after the Defendant's arrest, Will met with Detective Swierk to discuss the case and to give the detective items that he found while cleaning Defendant's room, which included handcuffs.[13] Will also found a rope in the closet of the master bedroom while he was cleaning and, suspecting it might be evidence, invited Detective Swierk to come to the house to pick up the rope.[14] The trial justice denied Defendant's pretrial motion to suppress the rope on Fourth Amendment grounds.[15]

At trial, Jane testified that Defendant picked her up while he was naked and brought her to the master bedroom where he used a rope to tie her hands and feet and proceeded to touch her

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 990-91.
15. *Id.* at 991.

"private spot" with his finger.[16] Further, Houle testified that during a prior conversation with Jane, she identified Defendant as the assailant and said Defendant caused her injuries while her mother was at work.[17] Houle's testimony was admitted at trial over an objection by Defendant that it constituted inadmissible hearsay.[18] Dr. Goldberg testified that Jane's injury was "one of the most severe injuries she had seen."[19]

The Defendant was convicted of first degree child molestation sexual assault.[20] Defendant's motion for a new trial was denied and he was sentenced to fifty years at an Adult Correctional Institution; thirty of those years would be served and the rest suspended with probation.[21]

ANALYSIS AND HOLDING

On appeal, Defendant argued that the trial justice erred when he: (1) denied the Defendant's motion to suppress the rope, (2) ordered the courtroom partially closed during Jane's testimony, (3) allowed Houle to testify that Jane identified Defendant as her assailant, and (4) denied Defendant's motion to pass the case on allegedly prejudicial comments made during the state's closing arguments.[22]

Admissibility of the Rope

Defendant argued that the rope was the fruit of a warrantless seizure in violation of the Fourth Amendment because Will had no apparent authority to authorize a search in a home that was not his, the state failed to prove that Jen consented to the seizure, and argued that the inevitable-discovery doctrine should not apply.[23] The state, on the other hand, argued that Jen consented to the seizure, that Will had apparent authority to consent, and that the inevitable-discovery doctrine did apply.[24] The state had the

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* Defendant's other post-verdict motions were all denied as well.
22. *Id.*
23. *See id.* at 991-992.
24. *See id.* at 992.

burden of proving that, based on the totality of the circumstances, the evidence was not obtained in violation of the Fourth Amendment.[25]

The Court first examined the nature of a private search.[26] "When deciding whether to admit the fruits of a private search, it is incumbent upon the court to determine whether the law enforcement agency's involvement was a significant expansion of the search."[27] The Court held that the rope was the fruit of a private search to which the Fourth Amendment has no application because Detective Swierk was invited to search the closet, shown where the item was, and did not rummage or expand the search in any way.[28] However, since Detective Swierk entered the house and seized the rope without a warrant, analysis was required beyond the scope of private search.

The Superior Court determined that Detective Swierk had seized the rope with Jen's consent, and the Supreme Court agreed.[29] The Fourth Amendment prohibition against warrantless searches and seizures does not apply "to situations in which voluntary consent has been obtained, either from the individual whose property is being searched, or from a third party who possesses common authority over the premises."[30] Thus, based on the totality of the circumstances, Jen voluntarily consented to the seizure of the rope by Detective Swierk.[31]

Although it was Will who invited Detective Swierk into the home, both men encountered Jen in the common area upon entering the home, where they exchanged pleasantries.[32] Notably, Jen neither questioned nor objected to Will or Detective Swierk going into the bedroom upon being told that they were going to inspect something that Will had found.[33] Based on these facts, the Court held that Detective Swierk seized the rope with Jen's consent, and thus the Fourth Amendment did not apply to

25. *Id.* at 995.
26. *Id.*
27. *Id* (quoting State v. Von Bulow, 475 A.2d at 1015 (R.I. 1984)).
28. *Id.* at 996.
29. *Id.* at 997.
30. *Id* at 996 (quoting State v. Rodriguez, 497 U.S. 177, 181 (1990)).
31. *Id.* at 997.
32. *Id.*
33. *Id.*

suppress the rope.[34]

The Court also held that even if there was a Fourth Amendment violation, the rope would have been admissible under the inevitable-discovery doctrine.[35] Even if evidence is obtained illegally, "the inevitable-discovery exception permits it to be admitted upon a showing that the evidence would have been discovered legally had the legal means not been aborted because of the illegal seizure."[36] Here, the Court inferred that if the rope was actually obtained in violation of the Sixth Amendment, it would have been discovered legally had the legal means not been aborted.[37] The Court made this inference because they were confident that, had Detective Swierk not obtained the rope by retrieving it from the house, the rope would have been legally obtained because Will would have voluntarily given it to Detective Swierk in the same manner in which he voluntarily gave the handcuffs to Detective Swierk.[38] Thus, the inevitable-discovery exception applied.[39]

Lastly, the Court examines apparent authority. The Court held that while Will did not have apparent authority to consent to a search of the house, this was irrelevant because no Fourth Amendment violation occurred.[40]

Courtroom Closure

Defendant also argued that the Superior Court denied him his Sixth Amendment right to a public trial when the trial justice ruled that the courtroom would be closed to exclude unnecessary

34. *See id.*
35. *See id.*
36. *Id.* at 998 (citing State v. Cobb, 743 A.2d 1, 39 (Conn. 1999)). The state must meet this burden of proof by establishing verifiable historical facts, not by mere speculation.
37. *Id.*
38. *Id.*
39. *Id.*
40. *See id.* The test for apparent authority is whether, based on the information in an officer's possession, the officer reasonably believed that the consenting individual had the authority to authorize a search. That is clearly not the case in this situation because during Will's first discussion with Detective Swierk, he indicated to Detective Swierk that he was simply a guest in Jen's house. Thus, Detective Swierk could not have reasonably believed Will had the authority to consent.

personnel.[41] The state argued that the closure was proper based on two statutory provisions, both of which the Court rejected.[42] However, the Court accepted the state's argument that in light of Jane's age, the nature of the allegation, and her expected testimony, the courtroom closure was appropriate.[43] The Supreme Court has held that that courtroom closures are an effective means to protect children from the psychological harm that stems from testifying as a witness under difficult circumstances.[44] Furthermore, Defendant failed to prove that anyone was actually excluded from the courtroom, and the Court refused to hold that a trial justice's closure was a reversible error when the record does not establish the same.[45] Given the policy of protecting minors from the psychological harm of testifying about sexual assault, and the fact that the record did not show that anyone was actually excluded, the Supreme Court held that the Superior Court did not abuse their discretion by ruling that Defendant was not denied his Sixth Amendment right to a public trial.[46]

DCYF Investigator Testimony

Defendant next argued that Houle's testimony regarding her conversation with Jane where Jane identified Defendant as the assailant was inadmissible hearsay and should have been suppressed.[47] At trial, the defense counsel elicited from Jane that she had practiced what she was going to say at trial, implying that the state coached her by providing her with answers to give about the incident.[48] To rebut this evidence, Houle offered the evidence

41. *Id.* at 1001.

42. *See id.* at 1001-03. R.I. GEN. LAWS §12-28-8 (1956) and R.I. GEN. LAWS § 11-37-13.2 (1956). Both of these statues simply express the fact that a child who testifies at trial presumptively suffers harm, and that the court should alleviate that harm. However, these statutes say nothing about courtroom closure.

43. *Id.* at 1001.

44. *Id.* at 1002. (citing Globe Newspaper Co. v. Superior Court for Norfolk, 457 U.S. 596, 607 (1982)).

45. *Id.* at 1002-03. (citing State v. Fayerweather, 540 A.2d 353, 354 (R.I. 1988)).

46. *Id.* at 1004.

47. *Id.*

48. *Id.*

of the conversation she had with Jane at the hospital where she identified Defendant as the assailant.[49] "The trial justice held that the statement was admissible: (1) under the medical-diagnosis-and-treatment-hearsay exception, R.I. R.Evid. 804(4); (2) as an identification of an assailant, R.I. R.Evid. 801(d)(1)(C); and (3) as a prior consistent statement, R.I. R.Evid. 801(d)(1)(B), to rebut an implied charge of improper influence."[50] The Supreme Court held that Houle's testimony was not admissible under the medical-diagnosis-and-treatment hearsay exception or as a statement of identification, but was admissible as a prior consistent statement.[51]

The R.I. Rule of Evidence 801(d)(1)(B) provides that a statement does not qualify as hearsay if the declarant is subject to cross-examination regarding a statement made at the hearing/trial, the declarant's testimony and statement are consistent and the testimony is offered to rebut an accusation of recent fabrication or improper influence of motive on the part of the declarant.[52] The admissibility of prior inconsistent statements is conditioned on the fact that they must predate the occurrence of the alleged improper influence.[53] Here, there was a direct and indirect implication of improper influence where the defense counsel lead Jane into stating that she had met with the prosecution to practice what she would say at trial and where the defense counsel implied that Jane was provided with scripted answers.[54] Also, because the record clearly provided that Jane's meeting with the police was subsequent to Jane's statement to Houle, the trial justice correctly held that the statement was subject to Rule 801(d)(1)(B) and thus, was admissible.[55]

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49. *Id.*
50. *Id.*
51. *See id* at 1005. The statement was not admissible under the medical-diagnosis-and-treatment hearsay exception because Houle is a social worker. The statement was also not admissible as a statement of identification because identification was not an issue in the case.
52. *Id.*
53. *Id.*
54. *Id* at 1004.
55. *Id* at 1006.

Prosecution's Closing Argument

Finally, Defendant argued that the trial court erred by not granting a new trial after the prosecution made a prejudicial statement during his closing argument.[56] During closing arguments, the prosecution characterized Defendant as a "predator" who "preys on weak people."[57] To remedy the situation, the trial justice gave an instruction to the jury informing them that closing arguments are not evidence, that what the prosecution said was highly improper, and directing them to disregard the comments.[58] The state argued that this instruction cured any prejudice, and the Supreme Court agreed.[59]

The Supreme Court has held that "a prosecutor is given considerable latitude in their closing arguments so long as they are based upon the evidence."[60] When a prejudicial comment is made, the burden is on the trial justice to assess the probable effect of the comment.[61] If the trial justice provides a cautionary instruction, "the court must assume the jury complied with it unless it clearly appears otherwise."[62] While the Supreme Court stated their condemnation of attacks that solely serve to demonize a defendant, the Court held that any prejudice that the Defendant would have suffered as a result of the prosecution's comments was remedied by the prompt and comprehensive cautionary instruction provided by the trial justice.[63]

COMMENTARY

On the surface, it seems as though the Court reached the correct conclusion in this case. However, this decision establishes a dangerous precedent that is contrary to the law in many other jurisdictions.[64] The Court set a very low bar for what constitutes consent sufficient to qualify as an exception to the application of the Fourth Amendment by holding that consent exists simply by

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id* at 1007.
61. *Id.*
62. *Id.*
63. *Id.*
64. *See id.* at 1008-09 (Flaherty, J., dissenting).

demonstrating a lack of objection to the seizure.[65]

The Supreme Court acknowledged that for the consent exception to the Fourth Amendment to apply, the party seeking to invoke the exception must provide proof that the consent was given voluntarily.[66] In the present case, the Court determined that Jen voluntarily consented based on her failure to object both when Detective Swierk entered the home and when she was told the detective was going into her bedroom.[67] Besides this set of facts, the Court offered no further evidence to support the notion that Jen voluntarily consented to the seizure of the rope. The Court simply relied on her silence.

Contrary to the holding in this case, a number of other jurisdictions require consent to a search and seizure to be "unequivocal, specific, intelligently given, and uncontaminated by duress of coercion."[68] These courts have refused to infer consent simply from the fact that "a suspect remained silent, absent the presence of accompanying gestures."[69] Such gestures include gestures by the suspect for the police to enter, or the suspect assisting in the search.[70] These accompanying gestures suggest that the consent is unequivocal and specific.[71] Here, Jen's consent was inferred simply from her silence and lack of objection, as there were not any accompanying gestures to suggest consent.[72] While the Court claimed that the present factual scenario should not be seen as an "open sesame to predicating a finding of consent upon silence," the ruling suggests otherwise.[73] This low standard for establishing consent "exceeds the scope of any recognized exception to the Fourth Amendment."[74]

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65. *See id.*
66. *Id.* at 996.
67. *Id.* at 997.
68. *Id.* at 1008 (Flaherty, J., dissenting) (quoting Robinson v. State, 578 P.2d 141, 144 (Alaska 1978)).
69. *Id* (citing United States v. Shiabu, 920 F.2d 1423, 1427 (9th Cir. 1990)).
70. *Id.* at 1008-09 (citing United States v. Albreksten, 151 F.3d 951, 955 (9th Cir. 1998)).
71. *Id.* at 1008.
72. *Id.*
73. *Id.* at 997.
74. *Id.*

CONCLUSION

The Rhode Island Supreme Court affirmed the Superior Court's rulings that: (1) admitting the rope into evidence did not violate the Fourth Amendment because it was the product of a private search and the officer received subsequent consent to retrieve it, (2) defendant's Sixth Amendment right to a public trial was not violated when the courtroom was closed to unnecessary personnel to protect the victim from the emotional trauma of testifying about her sexual molestation, (3) the DCYF agent's statement was not inadmissible hearsay because it fell within the scope of the prior consistent statement exception, and (4) the prosecutor's closing arguments cured any prejudicial effect they may have had where the trial justice provided a comprehensive cautionary instruction.[75]

Paul M. Grocki

75. *See id.* at 997, 1002, 1005, 1007.

Family Law. *In Re Natalya C.*, 946 A.2d 198 (R.I. 2008). The Department of Children, Youth and Families (DCYF) has a duty to make reasonable efforts to achieve reunification between a parent and his or her child prior to filing a petition terminating parental rights. Reasonable efforts include any program with the potential of remedying the problem that DCYF seeks to correct in the parent before reinstating parental rights.

FACTS AND TRAVEL

In August of 1999, Stephanie Calise (Stephanie) had her eleven-month-old daughter, Natalya, removed from her care due to Stephanie's continued problems with drug abuse.[1] The DCYF offered Stephanie services to treat her drug abuse and mental health issues, subsequently reunited her with Natalya, and closed the case.[2] In 2004, Natalya (then six years of age) made statements that suggested Stephanie was abusing drugs.[3] In response, DCYF took action, but caseworker Bridgett Crook (Crook) ultimately expressed no concerns about Natalya's welfare and did not remove her from Stephanie's custody.[4]

Stephanie's suspected substance abuse in September of 2004 prompted the DCYF to file a petition in Family Court under G.L. 1956 §14-1-11 for neglect.[5] Following the petition, Stephanie refused to submit to a urine test and declared that she would test positive.[6] By order of the Family Court, Natalya was removed from her mother's care and placed with a foster parent.[7] DCYF caseworker Crook and Stephanie agreed on a case plan that would start in November 2004 and end in May 2005, which was intended

1. *See In Re* Natalya C., 946 A.2d 198, 199 (R.I. 2008).
2. *Id.*; *see also id.* at n.5 ("Stephanie has had a history of depression since she witnessed the murder of her mother and a train conductor while she was a passenger on an Amtrak train when she was a young girl.")
3. *Id.* at 199.
4. *Id.* at 199-200.
5. *Id.* at 200; *see also id.* at n.6 (describing the relevant parts of R.I. GEN. LAWS §14-1-11 (1956) and how it applies to the case.)
6. *Id.*
7. *Id.*

to end Stephanie's drug use.[8] The case plan further required Stephanie to "remain drug free, participate in substance abuse treatment, and submit to supervised random urine screens."[9] The case plan, however, did not provide for mental-health treatment or psychological evaluations.[10]

By the end of 2004, Stephanie had attended multiple drug treatment programs but had relapsed back to her drug abuse.[11] Stephanie was arrested for possession of a controlled substance and was incarcerated.[12] Upon her release, Stephanie met with DCYF caseworker, Mary Thuot (Thuot), concerning future treatment and Stephanie's lack of transportation.[13] Finally on October 31, 2005, as a result of Stephanie's continued failure to attend treatment, DCYF filed a petition to terminate parental rights (TPR) under §15-7-7(a)(3) and (a)(2)(iii).[14] The testimony during the hearing established that Stephanie was not engaged in any drug abuse treatment and that she had been diagnosed with depression.[15] The record further revealed that there was a possible link between Stephanie's depression and her drug abuse.[16]

Upon review of the testimony and records, the Family Court terminated Stephanie's parental rights in accordance with the statute.[17] The Judge found that "(1) Stephanie was an unfit mother because of her failure to adequately address her chronic substance abuse; (2) DCYF took reasonable efforts to reunite Stephanie and Natalya before it filed a TPR petition, and (3) Natalya's best interests were served by terminating her mother's parental rights because of Stephanie's inability to properly care for her daughter."[18] The Trial Court further noted that Stephanie was offered services for her drug abuse, but never availed herself of such services and failed to make a good faith effort to obtain

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id*
12. *Id.*
13. *Id.* at 201.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 201-02.
18. *Id.* at 202.

treatment.[19] Stephanie appealed the termination of parental rights decree and argued that the trial court erred in finding that DCYF met its burden of proving that it made reasonable efforts to obtain reunification prior to the filing of the TPR petition.[20]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court was quick to point out the natural and fundamental rights of parents in the care, custody, and management of their child.[21] The Court stressed that a parent's rights do not "evaporate if they are not model parents or have lost temporary custody of their child."[22] The Supreme Court reiterated the standard that until parental unfitness has been proven by clear and convincing evidence, the parents and child have a vital interest in preventing erroneous termination of their relationship.[23]

The key issue that the Court resolved in this case was whether DCYF reasonably attempted reunification prior to the termination of parental rights. The Court defined reasonable efforts as "a subjective standard subject to a case-by-case analysis, taking into account, among other things, the conduct and cooperation of the parents."[24] The Court noted that the services of DCYF must be offered regardless of the likelihood of success and must be services that "address or correct" the problem that has led to removal of custody.[25]

The Court held that DCYF made reasonable efforts to cure Stephanie's drug abuse problem and was not required to offer any additional drug counseling.[26] However, DCYF was "wholly unreasonable" when it did not include any mental-health treatment in Stephanie's case plan.[27] The Court reasoned that DCYF had access to and reviewed Stephanie's medical records and therefore knew or should have known of the drug counselor's

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 203.
24. *Id.*
25. *Id.*
26. *Id.* at 204.
27. *Id.*

concern about the effect of Stephanie's depression contributing to her increased chance of relapse.[28] The Court found that this was a case where DCYF completely failed to address a problem in which a parent's recalcitrance precluded reunification.[29] The fact that Stephanie's depression was linked to her drug abuse and DCYF's failure to address the depression made reunification highly unlikely.[30] The Court rejected the argument that Stephanie's lack of desire or request for psychiatric treatment was relevant in the determination of DCYF's reasonable efforts.[31]

The Rhode Island Supreme Court held that DCYF is responsible for creating case plans that will attempt to enable reunification.[32] The Court stated that it is the burden of DCYF and its caseworkers to adjust the plan to the needs of the parent because the parent lacks the necessary expertise and perspective to fashion an effective case plan.[33]

COMMENTARY

The Supreme Court in this case assumed the role of protector of fundamental parental rights. In the beginning of the opinion, the Court established the burden DCYF must be overcome before parental rights may be terminated. The Court further articulated an interest in maintaining the parent/child relationship. This decision establishes that the Court will not readily strip a parent of his or her rights because he or she is not a "model parent" or because he or she has made mistakes in the past. Further, it places a duty on DCYF to attempt reunification as opposed to termination.

The Court reasoned that DCYF is responsible for making effective case plans regardless of their potential for success. Further, the case plans must address the problem that DCYF seeks to correct. In this case, the problem was drug abuse that was addressed with substance abuse treatment programs. However, the plan completely neglected to address the depression

28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

that was linked to her drug abuse. The decision effectively guarantees that DCYF will address the sub-causes that contribute to removal of custody when establishing a case plan. However, it may ultimately lead to increased appeals by parents on the ground of failure to correct all necessary sub-causes that contribute to the custody removal. Future claims may lead to sweeping inquiries into potential contributing factors ranging from physical to mental health and ultimately place a heavy burden on DCYF's case planning options.

CONCLUSION

The case is an important statement by the Rhode Island Supreme Court, establishing the duties of the DCYF to parents. DCYF must make reasonable efforts towards reunification prior to applying for a petition to terminate parental rights. Reasonable efforts mean formulation of an effective case plan that adequately remedies the problem DCYF seeks to correct, regardless of the likelihood of success of reunification and parental participation.

Joseph D. Chimienti

Insurance Law. *Imperial Cas. and Indem. Co. v. Bellini,* 947 A.2d 886 (R.I. 2008). The Rhode Island Supreme Court held that a plaintiff's claim of bad faith on the part of an insurance company will be held to the "fairly debatable" standard, emphasizing that a bad faith claim must demonstrate an absence of a reasonable basis in law or fact for denying the claim or that the insurer intentionally or recklessly failed to properly investigate the claim. Additionally, the Court maintained its long-standing preference for simple interest instead of compound interest on damage awards.

FACTS AND TRAVEL

On October 8, 1985, Michael DeSantis (DeSantis), a United States Postal Service employee, fell and was injured when a step collapsed underneath him while delivering mail at 24 Atwood Street in Providence, Rhode Island.[1] In May, the owner Amitie Bellini (Bellini) had conveyed her interest in the property to Norbell Realty Corporation (Norbell), a corporation of which she was the principal and owner.[2] Subsequently, Imperial Casualty and Indemnity Company (Imperial) issued an insurance policy to Bellini, covering several properties including the Atwood Street property.[3] Norbell was not listed as an insured under that policy.[4] On October 31, 1985, Imperial added Norbell to the above-referenced policy as an additional insured on another property, making no reference to the Atwood Street property.[5]

DeSantis filed a lawsuit in Superior Court against Norbell, seeking damages for personal injury.[6] Imperial issued a letter reserving its rights, which questioned whether Norbell actually qualified as an additional insured.[7] In fact, if Norbell was not an

1. Imperial Cas. and Indem. Co. v. Bellini, 947 A.2d 886, 887 (R.I. 2008).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 887-88.
7. *Id.* at 888.

additional insured on the Atwood property, Imperial would not be obligated to compensate DeSantis for his injuries.[8] In July of 1991, Imperial sent Bellini a letter demanding she pay a $250 deductible, which she paid with a check in August of 1991.[9]

The previous events lead to three separate legal actions: DeSantis' personal injury action against Norbell (the Norbell Personal Injury Action), a declaratory judgment action Imperial brought to obtain a ruling as to its potential liability under the insurance policy (the Declaratory Judgment Action), and a direct action by DeSantis against Imperial (the Imperial Action), asserting that Imperial was required to compensate him pursuant to his victory against Norbell in the Norbell Personal Injury Action.[10] Regarding the Declaratory Judgment Action, Imperial contended that the policy did not provide coverage to Norbell regarding the October 1985 incident.[11] Norbell and Bellini were named as defendants, and DeSantis intervened.[12]

Subsequently, DeSantis brought the Norbell Personal Injury Action, and Imperial defended Norbell.[13] A jury returned a verdict awarding damages to DeSantis in the amount of $235,000, which was reduced to $155,000.[14]

While the Declaratory Judgment Action was still pending, Bellini assigned her rights as the insured to DeSantis, and he commenced the Imperial Action, in which he filed a direct action against Imperial and sought to hold it liable for the judgment against Norbell.[15] In the action, he alleged Imperial breached its duty of good faith.[16] Imperial's motion seeking consolidation of the Imperial Action and the Declaratory Judgment Action was granted.[17] Imperial filed a petition for certiorari with the Supreme Court of Rhode Island on the issue of severance, and the bad faith claim was severed from DeSantis' other claims in the

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

consolidated action.[18]

The case was remanded to the Superior Court for a bench trial, and the judge ruled in favor of Imperial.[19] DeSantis, Bellini, and Norbell appealed.[20] The Supreme Court reversed, holding Imperial had waived its rights to deny coverage when it demanded and accepted Bellini's payment of the $250 deductible in August of 1991.[21] The Court "disagree[d] with the logic that an insurance company may avoid waiver by, on the one hand, insisting compliance with an insurance contract, and on the other hand, insisting that the insurance contract affords no coverage to the party claiming defense or indemnity under the provisions of the policy."[22]

The case was remanded again, and on remand, DeSantis moved for partial summary judgment on his debt on judgment claim, contending that compound post-judgment interest should be added to that amount based on section 9-21-10.[23] With compound interest, Imperial would owe DeSantis approximately $1.3 million; however, computed with simple interest, Imperial would owe DeSantis approximately $739,000, which Imperial had already paid.[24] The Superior Court granted DeSantis' motion for partial summary judgment, but ruled that simple interest, not compound interest, would be added to the sum Imperial owed.[25]

Imperial moved for summary judgment on the bad faith claim.[26] Imperial relied on section 9-1-33(a) of the Rhode Island General Laws, claiming the statute confers on the insured the right to bring a claim of bad faith against an insurer, and that "DeSantis is not the insured."[27] Imperial argued that it had paid

18. *Id.* (citing Imperial Cas. and Indem. Co. v. Bellini, 746 A.2d 130 (R.I. 2000)).

19. *Id.* at 889.

20. *Id.*

21. *Id.* (citing Imperial Cas. and Indem. Co. v. Bellini, 888 A.2d 957 (R.I. 2005)).

22. *Id.* (citing *Imperial*, 888 A.2d at 964).

23. *Id.* at 889 n.2 (citing R.I. GEN. LAWS § 9-21-10(a) (1956), which states in pertinent part "Post-judgment interest shall be calculated at the rate of twelve percent (12) per annum and accrue on both the principal amount of the judgment and the prejudgment interest entered therein.").

24. *Id.* at 889 n.1.

25. *Id.* at 890.

26. *Id.*

27. *Id.* at 890 n.3 (citing R.I. GEN. LAWS § 9-1-33 (1956), which states in

the full amount of DeSantis' judgment, and because they had not acted in bad faith, there was no remaining claim Norbell could have assigned, even if the assignment was permitted under the statute.[28] The hearing justice ruled that DeSantis did not have the right to assert a claim of bad faith based on section 27-7-2[29], which "does not contemplate an action of the insured party in bad faith."[30] Additionally, a bad faith cause of action is not generally assignable except where an insurer's bad faith refusal to settle results in a judgment in excess of policy limits.[31] The aforementioned exception was set out in *Mello v. General Insurance Co. of America.*[32] However, the facts of that case did not apply to DeSantis' claim.[33] DeSantis, Bellini, and Norbell appealed.[34]

On appeal, the appellants argued that the hearing justice erred in granting Imperial's motion for summary judgment based on the ruling that Norbell did not possess an outstanding bad faith claim against Imperial.[35] Additionally, appellants argued that the hearing justice erroneously concluded that DeSantis, as an assignee, did not have the right to pursue a bad faith claim under section 27-7-2, and that Bellini had standing to pursue a bad faith claim in her own name.[36] Lastly, appellants argued the justice erred in granting only simple interest and not compound interest.[37]

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pertinent part "[A]n insured under any insurance policy as set out in the general laws or otherwise may bring an action against the insurer issuing the policy when it is alleged the insurer wrongfully and in bad faith refused to pay or settle a claim made pursuant to the provisions of the policy).

28. *Id.* at 890.

29. *Id.* at 890 n.4 (citing R.I. GEN. LAWS § 27-7-2 (1956), which states in pertinent part "[T]he injured party... after having obtained judgment against the insured alone, may proceed on that judgment in a separate action against the insurer, provided, the payment in whole or in part of the liability by either the insured or the insurer shall, to the extent of the payment, be a bar to recovery against the other of the amount paid.").

30. *Id.* at 890.

31. *Id.* at 891.

32. 525 A.2d 1304 (R.I. 1987).

33. *Id.* (citing *Mello*, 525 A.2d at 1304).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 891.

BACKGROUND

Rhode Island's statute on the calculation of prejudgment interest states "in any civil action in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12) per annum thereon from the date the cause of action accrued, which shall be included in the judgment entered therein."[38] In regard to post-judgment interest, the statute states in pertinent part "post-judgment interest shall be calculated at the rate of twelve percent (12) per annum and accrue on both the principal amount of the judgment and the prejudgment interest entered therein."[39] Further, the General Assembly has specifically mandated that interest should be compounded on certain municipal retirement plans.[40]

On the issue of bad faith claims, the statute states "an insured under any insurance policy as set out in the general laws or otherwise may bring an action against the insurer issuing the policy when it is alleged the insurer wrongfully and in bad faith refused to pay or settle a claim made pursuant to the provisions of the policy, or otherwise wrongfully and in bad faith refused to timely perform its obligations under the contract of insurance."[41] On the issue of assignability, the statute states "the injured party. . . after having obtained judgment against the insured alone, may proceed on that judgment in a separate action against the insurer, provided, the payment in whole or in part of the liability by either the insured or the insurer shall, to the extent of the payment, be a bar to recovery against the other of the amount paid."[42]

In *Mello,* the Rhode Island Supreme Court analyzed whether a claim of bad faith against an insurer is assignable.[43] In analyzing § 9-1-33, the Court concluded that though it does not advocate a general policy of allowing assignment of the right to sue an insurance company for bad faith, it was "'convinced that in certain limited circumstances the insured's right may be

38. R.I. GEN. LAWS § 9-21-10(a) (1956).
39. *Id.*
40. R.I. GEN. LAWS § 42-11.1-6(e) (1956).
41. R.I. GEN. LAWS § 9-1-33 (1956).
42. R.I. GEN. LAWS § 27-7-2 (1956).
43. Imperial Cas. and Indem. Co. v. Bellini, 947 A.2d 886, 892 (R.I. 2008) (citing Mello v. General Insurance Co. of America, 525 A.2d 1304 (R.I. 1987)).

assigned'" and that the facts of the case constituted such a circumstance.[44] The applicable facts were that after failed settlement negotiations, where plaintiff twice offered to settle within policy limits,[45] a verdict was rendered in plaintiff's favor against the car wash business, and defendant paid the plaintiff up to the amount of the policy limits, but refused to pay the part of judgment exceeding that amount.[46] Based on the specific facts of *Mello*, the Court held "'an insured may assign its bad-faith claim against its insurer to the injured claimant for the limited purpose of recovering the difference between the judgment received against the insured and the insurance-policy limits.'"[47]

The Court previously held that a claim of "bad faith 'is established when the insurer denied coverage or refused payment without a reasonable basis in fact or law for the denial.'"[48] The standard employed is the "fairly debatable" standard, meaning "an insurer 'is entitled to debate a claim that is fairly debatable.'"[49] Ultimately, a bad faith claim is only established where "'the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable.'"[50] The Supreme Court emphasized that not every instance where an insurance company refuses to pay constituted bad faith.[51]

ANALYSIS AND HOLDING

In evaluating the facts of *Bellini*, the Rhode Island Supreme Court held that Imperial's position did not constitute bad faith because it "easily me[t] the 'fairly debatable' standard."[52] The Court found that the facts did not show "'an absence of a reasonable basis in law or fact for denying the claim' or that. . . the insurer intentionally or recklessly failed to properly investigate the claim."[53] The Court stated that "the complex-and-protracted-history of the case" indicated that Imperial did not act

44. *Id.* at 892 (quoting *Mello*, 525 A.2d at 1306).
45. *Id.* (citing *Mello*, 525 A.2d at 1306).
46. *Id.* (citing *Mello*, 525 A.2d at 1306).
47. *Id.* (quoting *Mello*, 525 A.2d at 1306).
48. *Id.* (quoting Skaling v. Aetna Ins. Co., 799 A.2d 997, 1010 (R.I. 2002)).
49. *Id.* (quoting *Skaling*, 799 A.2d at 1011).
50. *Id.* (quoting *Skaling*, 799 A.2d at 1011).
51. *Id.* (citing *Skaling*, 799 A.2d at 1012).
52. *Id.* at 894 (quoting *Skaling*, 799 A.2d at 1011).
53. *Id.* at 893 (quoting *Skaling*, 799 A.2d at 1012).

in bad faith."[54] Therefore, the Court upheld the hearing justice's grant of summary judgment dismissing the bad faith claims against Imperial[55] without having to decide whether a bad faith claim was assignable.[56]

On the issue of compound interest, the Court "wholeheartedly agree[d]" with the ruling of the hearing justice finding that post-judgment interest would be calculated as simple interest, and not compound interest.[57] The Court reiterated that it "has always interpreted the prejudgment interest statute as referring to simple, not compound, interest" and employed an analysis of the "virtually identical statutory language" governing prejudgment and post-judgment interest.[58] Additionally, the Court evaluated the express language of section 42-11.1.-6(e) allowing for compounded interest, and found that "such a specific authorization [was] notably absent from § 9-21-10(a), the statute governing post-judgment interest."[59] The Court ruled there was "absolutely no reason why [it] should deviate from [its] long-standing preference for simple interest rather than compound interest on damage awards, except when there is a specific statutory mandate to the contrary."[60]

Ultimately, the Court affirmed the ruling of the Superior Court on the issues of bad faith and compound interest.[61]

COMMENTARY

Although the Court chose not to decide whether the bad faith claim was assignable to DeSantis,[62] the decision is important because the Court further defined the "fairly debatable" standard set out in *Skaling v. Aetna Insurance Co.*[63] In particular, the Court found that the claim was fairly debatable, and that "the sheer duration of the litigation in [the] case constitutes [an]

54. *Id.* at 894.
55. *Id.*
56. *Id.* at 893.
57. *Id.* at 894-95.
58. *Id.* at 894 (citing R.I. GEN. LAWS § 9-21-10(a) (1956)).
59. *Id.* at 894 n.7.
60. *Id.* at 895.
61. *Id.*
62. *See id.* at 893.
63. 799 A.2d 997, 1011 (R.I. 2002).

indicat[ion] that Imperial's conduct [did] not constitute bad faith."[64] Overall, the Court's decision reinforces the idea that "not every instance where an insurance company refuses to pay constitutes bad faith."[65] The claim arose in 1985, Imperial litigated the case for more than a decade, and timely paid DeSantis for the damages arising from the consolidated action.[66] The Court's conclusion is beneficial to insurers in particular, and the courts in general, because it prevents prolonged litigation where an insurance company has fully cooperated with both the plaintiff and the decisions of the courts. Ultimately, the Court decided that after almost two decades of litigation, "'[t]he time has come for this litigation to end.'"[67]

Regarding the issue of simple versus compound interest, the Court gave deference to decisions of the legislature.[68] Instead of deviating from its "long-standing preference for simple interest rather than compound interest,"[69] the Court continued its practice of applying simple interest absent a statutory mandate to the contrary. The Court ultimately decided that the issue of favoring compound interest on damage awards was best suited for the legislature, rather than the judiciary.[70]

CONCLUSION

The Rhode Island Supreme Court held that a claim of bad faith will be held to the "fairly debatable" standard, meaning an insurance company will not be guilty of bad faith as long as the claim is fairly debatable. Here, Imperial did not act in bad faith because the issue of whether a bad faith claim can be assigned to an uninsured party was fairly debatable. Without a showing of unreasonable delay or improper investigation of a claim, an insurer's action does not constitute bad faith.

Additionally, the Court upheld its policy of favoring simple interest, instead of compound interest, on damages, unless a

64. Imperial Cas. and Indem. Co. v. Bellini, 947 A.2d 886, 894 (R.I. 2008).
65. *Id.* at 893.
66. *Id.* at 889 n.1.
67. *Id.* at 895 (quoting Northern Trust Co. v. Zoning Bd. of Review of Westerly, 899 A.2d 517, 520 (R.I. 2006)).
68. *See id.* at n.11.
69. *Id.* at 895.
70. *Id.* at n.11.

statutory provision mandates the contrary. In particular, the statutory language on prejudgment and post-judgment interest mandates the same calculation of both amounts, and the Court has always interpreted the prejudgment interest statute as mandating simple interest only.

Diane Shea

Property Law. *Carrozza v. Carrozza*, 944 A.2d 161 (R.I. 2008). In this family dispute over the ownership of property, the Rhode Island Supreme Court re-examined state law concerning adverse possession and the signature and notary requirements inherent in a valid deed transfer.[1] Specifically before the Court was whether the plaintiff's name written in block letters qualifies as a signature, whether failure to notarize a deed is a fatal flaw in a deed transfer, and finally, whether a grantor can successfully bring a claim of adverse possession against a grantee.[2] The Court held that a signature printed in block letters and a failure to notarize do not invalidate a deed, and further held that a grantor cannot later claim title to property that he has validly transferred by adverse possession because of the warranty of quiet enjoyment implied in all Rhode Island property transfers.[3]

FACTS AND TRAVEL

This case involves a dispute over ownership of real property located at 168-172 Atwells Avenue in Providence, Rhode Island. The property had been in the hands of the Carrozza family since 1948, and was transferred to the plaintiff, Frederick Carrozza Sr. (hereinafter "Frederick Sr."), in 1986.[4] Frederick Sr. acquired a one-third interest in the property by way of a quitclaim deed from Frederick Sr.'s brother Samuel, Samuel's wife Ellen, and Frederick Sr.'s mother Edith, who had owned the property as tenants in common.[5] Thus, Frederick Sr. owned a 33 percent interest in the property along with Samuel and Ellen, who each owned a similar 33 percent interest.[6]

Six years later, Frederick Sr. transferred his one-third interest in the property to his mother Edith by warranty deed.[7]

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1. Carrozza v. Carrozza, 944 A.2d 161, 163 (R.I. 2008).
2. *Id.* at 164.
3. *Id.* at 165, 166.
4. *Id.* at 162.
5. *Id.*
6. *See id.*
7. *Id.*

This transfer was not notarized, and instead of signing the document, Frederick Sr. printed his name in block letters.[8] The next day, Edith transferred her one-third interest that she had acquired from Frederick Sr. to her grandson Frederick Jr. by warranty deed.[9] Similar to the transfer to Frederick Sr., Edith printed her name on the signature line.[10] Apparently aware of their mistakes, both Frederick Sr. and Edith filed corrective deeds on December 7, 1992, that recited the prior transfers.[11] On August 19, 2002, Frederick Jr. died, and Chevron Investors, LLC (hereinafter "Chevron") acquired his one-third interest in the Atwells Avenue property.[12]

On September 21, 2004, Frederick Sr. filed suit against Samuel, Ellen, and Chevron, seeking to set aside the deed transfers to his mother Edith, and in the alternative, to ask the court to grant him title by adverse possession.[13] Chevron subsequently filed a motion for summary judgment which Frederick Sr. opposed by submitting an affidavit claiming that the signature on the deed was not his.[14] The District Court granted Chevron's motion, holding the deed valid and Frederick Sr.'s adverse possession claim fatally flawed because of the warranties of quiet enjoyment and defense of title contained in the valid transfer.[15] The plaintiff timely appealed and was granted certiorari.[16]

ANALYSIS AND HOLDING

On certiorari, Frederick Sr. argued that a genuine issue of material fact existed so as to survive the defendant's summary judgment motion because the deed transfer was not properly signed and notarized.[17] The Court ruled, however, that his printed name on the signature line was sufficient.[18] Further, the

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 163.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 165.

Court ruled that the failure to notarize the deed was not fatal to a valid transfer of title from Frederick Sr. to his mother Edith.[19]

Rhode Island General Law § 34-11-1 states that a conveyance "shall be void unless made in writing duly signed, acknowledged as hereinafter provided, delivered, and recorded in the records of land evidence in the town or city where the lands. . .are situated. . ."[20] As to the § 34-11-1 signature requirement, the Court was persuaded by Black's Law Dictionary's broad definition of "signature" as "written by hand, printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached to another."[21] Thus, a signature will be valid even if it is only a mark, "as long as that mark is adopted as one's own."[22] The plaintiff's argument failed, because Frederick Sr.'s printed name on the signature line was sufficient under the Court's broad understanding of the signature requirement.[23]

The Court took a similar view of the plaintiff's argument that the deed was invalid because it was not notarized.[24] Frederick Sr. essentially argued that because the deed was not notarized, it was not "acknowledged" under § 34-11-1.[25] The Court stated, however, that under § 34-11-1, "the conveyance, if delivered, as between the parties and their heirs. . . shall be valid and binding though not acknowledged or recorded."[26] Here, the deed was delivered and recorded in the Providence Land Records, thus negating the need for the deed to be notarized in order to be valid.[27]

The Court then turned to the plaintiff's final argument, that if in fact the deed transfer was valid, he nonetheless maintained title to the property by adverse possession.[28] Under Rhode Island law, to establish title by adverse possession a plaintiff must prove that his possession was actual, open, notorious, hostile, under

19. *Id.*
20. *Id.* at 164 (quoting R.I. GEN. LAWS § 34-11-1 (1956)).
21. *Id.* at 165 (quoting BLACK'S LAW DICTIONARY, 1415 (8th ed. 2004)).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* (quoting R.I. GEN. LAWS § 34-11-1 (1956)).
27. *Id.* at 162.
28. *Id.* at 166.

claim of right, continuous, and exclusive for at least ten years.[29] However, reconciling the elements of adverse possession to the facts of this case became quite complicated because it is actually the grantor who sought title of the same real property that he transferred to the grantee.[30] The Court reasoned that because the September 24, 1992 warranty deed was effective as a valid transfer, several enumerated protections were guaranteed to the grantee according to § 34-11-15.

"Specifically, the grantor guarantees: (1) That at the time of the delivery of such deed he or she is lawfully seised in fee simple of the granted premises, (2) That the granted premises are free from all incumbrances, (3) That he or she has then good right, full power, and lawful authority to sell and convey the same to the grantee and his or her heirs and assigns, (4) That the grantee and his or her heirs and assigns shall at all times after the delivery of such deed peaceably and quietly have and enjoy the granted premises, and (5) That the grantor will, and his or her heirs, executors, and administrators shall, warrant and defend the granted premises to the grantee and his or her heirs and assigns forever against the lawful claims and demands of all persons."[31]

Of these implied warranties inherent in Rhode Island real property transfers, the fourth and fifth bear directly on Frederick Sr.'s adverse possession claim. Essentially, at the moment Frederick Sr. delivered the deed granting title to his mother Edith, he simultaneously warranted that he would "defend and protect the [grantee] against the rightful claims of all persons thereafter asserted."[32] This includes Frederick Sr. himself, which means he could not prevail on a claim of adverse possession against the grantee whom he warranted he would protect against lawful claims and demands.

COMMENTARY

A recurring theme in the Court's decision is the exaltation of substance over form. The approach taken by the Court serves to

29. *Id.* at 166 (quoting Acampora v. Pearson, 899 A.2d 459, 466 (R.I. 2006)).
30. *Id.*
31. *Id.* (quoting R.I. GEN. LAWS § 34-11-15 (1956)).
32. *Id.* (quoting Lewicki v. Marszalkowski, 455 A.2d 307, 309 (R.I. 1983)).

acknowledge the intent of the parties to a transfer of real property as being more important than the requirements of putting a transfer between mother and son into proper legal form. The case is significant because it tests a very common set of facts against the requirements for a deed to be valid in Rhode Island. Still left undetermined, however, is whether the Court's relaxed signature and notary requirements extend to arms-length transactions as well, as the Court explicitly stated that weighing on its decision was the important fact that "the General Assembly has anticipated the tendency of land transfers among family members to observe fewer formalities."[33]

CONCLUSION

The Court held that, under Rhode Island law, a printed name in block letters satisfies the signature requirement for a valid warranty deed.[34] Additionally, if a deed is not notarized, it will not automatically be invalid, so long as the deed was actually delivered.[35] Thus, Frederick Sr. effectively transferred his one-third interest in the Atwells Avenue property to his mother, despite the printed signature and lack of notarization.[36] It followed that Frederick Sr. could not prevail on an adverse possession claim on the same property that he effectively deeded away because of the implied warranty of quiet enjoyment inherent in the valid transfer.[37]

Kyle E. Posey

33. *Id.* at 165.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 166.

Property Law. *Pleasant Mgmt., LLC v. Carrasco*, 960 A.2d 216 (R.I. 2008). The Rhode Island Supreme Court found that the Superior Court committed clear error on remand by ruling on issues not before it, but affirmed on other grounds the lower court's vacation of the default entered against defendants for their breach of redemption agreement. The Court held that defendant's failure to appear at a hearing was the result of excusable neglect due to plaintiff's counsel's violation of the anti-contact rule (Article V, Rule 4.2 Supreme Court Rules of Professional Conduct). The Court also held that defendant had a prima facie meritorious defense to breach of redemption agreement, sufficient to set aside default judgment on grounds of excusable neglect. Finally, the Court held that, since plaintiff's redemption costs were governed by agreement and not by statute, plaintiff was only entitled to the amount specified in the redemption agreement.

FACTS AND TRAVEL

On November 10, 1999, after Maria Carrasco ("Carrasco") and Jose Ortega ("Ortega") (collectively "defendants") defaulted on sewage usage fees owed to the Narragansett Bay Commission (the "Commission"), the Commission conducted a tax sale of their tenement house located at 31 Atlantic Avenue in Providence.[1] Pleasant Management, LLC (plaintiff) purchased the property at the tax sale, and a year later filed a petition to foreclose on defendants' right of redemption.[2] Defendants objected to the petition, claiming that "they did not receive notice of the tax sale from the City of Providence or from plaintiff's counsel."[3] Prior to any judgment on the petition, however, the parties entered into a court-approved "redemption agreement," which allowed defendants to redeem the property in exchange for $5,300 at 12

1. Pleasant Mgmt., LLC v. Carrasco, 960 A.2d 216, 218 (R.I. 2008).
2. *Id.* "General Laws 1956 § 44-9-25(a) provides" that title holder "'may bring a petition in the superior court for the foreclosure of all rights of redemption under the title [after] one year from a sale of land for taxes.'" *Id.* at 218 n.1.
3. *Id.* at 218 n.1.

percent interest rate, to be paid at a monthly rate of $200.[4] Per the agreement, if defendants defaulted on their payments, plaintiff could then foreclose on defendants' right to redeem the property.[5]

In March 2003, defendants allegedly violated the redemption agreement by defaulting on their payment obligations, and plaintiff's counsel Steven Murray ("Murray") asked that defendants' right of redemption be foreclosed.[6] On April 1, 2003, Carrasco received notice of the April 10 hearing in the Superior Court.[7] Carrasco then telephoned Murray and told him she would deposit adequate funds into her account.[8] According to Carrasco's testimony, her belief was that the telephone conversation and the deposit of funds into her account settled the matter because Murray told her to "forget about court."[9] Based on this belief, neither defendants nor their attorney showed up to the April 10 hearing.[10] There was a discrepancy in the amount of outstanding funds, however, because Carrasco deposited only enough funds for what "she thought was one outstanding check," but two checks were actually outstanding, and as a result Murray was unable to deposit one of two checks.[11] Because of this situation, which led to the non-appearance of defendants at the scheduled hearing, the Superior Court entered a default decree against defendants.[12]

Defendants filed a motion to vacate the decree, alleging that they did not attend the hearing as a result of "Murray's assurances, during his telephone conversation with Carrasco, that the hearing would not proceed" and to "forget about court."[13] Defendants' motion to vacate was denied, and they timely appealed to the Rhode Island Supreme Court.[14]

On April 12, 2005, the Supreme Court held that Murray

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4. *Id.* at 218. The agreement also stipulated that defendants not contest the validity of the tax sale and waive any defenses with respect to the sale, including lack of notice. *Id.* at 218 n.2.
5. *Id.* at 218.
6. *Id.*
7. *Id.*
8. *Id.* at 218-19.
9. *Id.* at 219.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

violated Article V, Rule 4.2 of the Supreme Court Rules of Professional Conduct ("anti-contact rule") by engaging in a substantive telephone conversation with Carrasco while Carrasco was represented by counsel.[15] Thus, the Supreme Court vacated the default decree and remanded back to the Superior Court for a "determination of whether plaintiff's counsel's violation of the anti-contact rule amounted to excusable neglect."[16]

On remand, the Superior Court did not rule on the precise issue mandated by the Supreme Court, but did hold an evidentiary hearing that further explored the circumstances surrounding Carrasco and Murray's telephone conversation.[17] The hearing included a review of whether or not Murray violated the anti-contact rule, even though that issue was already clearly settled by the Supreme Court.[18] Contrary to the Supreme Court's ruling, the Superior Court held that Murray did *not* violate the anti-contact rule because it found that defendants' counsel gave Murray permission to speak with Carrasco.[19] The hearing also included Carrasco's testimony that the reason she deposited enough funds for only one check was because Murray never told her that there were two checks outstanding.[20] The Superior Court inexplicably held that *Murray's* conduct did not amount to excusable neglect (even though the excusable neglect at issue was

15. *Id.* (citing Pleasant Mgmt. v. Carrasco, 870 A.2d 443, 447 (R.I. 2005) (*Pleasant Mgmt. I*)). "Article V, Rule 4.2 of the Supreme Court Rules of Professional Conduct provides: 'In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.'" *Id.* at n.6.

16. *Id.* at 220 (citing *Pleasant Mgmt. I*, 870 A.2d at 447). "General Laws 1956 §9-21-2(a) provides" that "'a court may relieve a party or his or her legal representative from a final judgment, order, *decree* or proceeding entered therein for the following reasons: (1) Mistake, inadvertence, surprise, or *excusable neglect*.'" *Id.* at n.7 (emphasis added).

17. *Id.* at 220.

18. *Id.* at 220-21.

19. *Id.* at 220 n.8 and 221. This finding came despite defendants' counsel's testimony "that she never gave Murray permission to speak with her clients."

20. *Id.* at 220 (Carrasco also testified that she called Murray a second time on April 1, 2003 to notify him that she had just made a deposit. Murray denied that he ever had a second conversation with Carrasco on April 1, and that he ever told Carrasco to "forget about court.").

plaintiffs', not Murray's, as per Supreme Court's mandate).[21] The hearing justice held "that the default should [nevertheless] be vacated and defendants should be allowed the opportunity to redeem their property.[22] The justice also held that plaintiff was entitled to redemption costs and agreed with defendants that the cost should be calculated based on the parties' redemption agreement plus accrued interest.[23] Defendants paid plaintiff the set amount and plaintiff conveyed the property to defendants via a quitclaim deed.[24] A final judgment was entered, and plaintiff timely appealed.[25]

ANALYSIS AND HOLDING

Parties' Arguments on Appeal

Plaintiff argued that defendants' motion to vacate the default decree should have been denied and that the Superior Court exceeded the scope of the Rhode Island Supreme Court's mandate when it granted defendants' motion.[26] Plaintiff also argued that, by granting the motion, the hearing justice "improperly relieved defendants of their own attorney's negligence."[27] Additionally, plaintiff argued that the justice should not have vacated judgment based on equitable principles (ineffectiveness of counsel) since this was a "statutory proceeding under § 9-21-12."[28] Lastly, plaintiff argued that, even if the decree was properly vacated, redemption costs were not assessed in a correct manner.[29]

Defendants argued that, by accepting the redemption amounts ordered by the lower court and by tendering the deed to

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21. *Id.* at 221.

22. *Id.* (The hearing justice's reasoning was that "defendants were 'victim[s] of ineffectiveness of counsel,' because defendants' attorney did not contact Murray to ascertain whether the April 10 hearing would proceed as scheduled nor did she ultimately appear at the hearing.").

23. *Id.* (The redemption fee was $4,371 plus $1,000 in attorneys' fees. Plaintiff argued for a much larger figure ($108,522.48) that included all the property taxes it paid, plus interest, expenditure and capital improvement repairs, attorneys' fees, and rents collected by defendants.).

24. *Id.*

25. *Id.*

26. *Id.* at 222.

27. *Id.*

28. *Id.*

29. *Id.*

defendants before entry of final judgment, plaintiff waived its right to appeal.[30] They also contended that the hearing justice correctly calculated the redemption amount.[31]

Supreme Court's Decision

The standard of review applicable to a motion to vacate a decree is one of abuse of discretion or error of law.[32] That is, "'unless it appears that the trial justice abused his discretion or made his determination on an error of law, that determination will not be disturbed by [the] [C]ourt on review.'"[33]

The Supreme Court found that the Superior Court committed numerous errors on remand, but nevertheless affirmed the lower court's ruling on other grounds.[34] First, the Supreme Court held that Murray's "violation of the anti-contact rule led to excusable neglect by defendants because it caused them to fail to appear at the hearing."[35] The Court defined excusable neglect as "'failure to take the proper steps at the proper time . . . in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on *promises made by the adverse party*.'"[36] Excusable neglect, the Court held, "should be interpreted flexibly"[37] and relief from judgment should be granted if, "'taking account of all relevant circumstances,'"[38] "'a reasonably prudent person . . . under similar circumstances'"[39] would have taken the same course of conduct. Here the Court noted that, had Murray abided by the anti-contact rule and communicated with Carrasco only through her attorney, no confusion would have

30. *Id.* This is referred to as the doctrine of "acceptance of benefits."
31. *Id.*
32. *Id.* at 221 (citing Pleasant Mgmt. LLC v. Carrasco, 870 A.2d 443, 445 (R.I. 2005)).
33. *Id.* at 222 (quoting Pate v. Pate, 196 A.2d 723, 726 (R.I. 1964)).
34. *Id.* at 227. "[T]his Court is free to 'affirm a ruling on grounds other than those stated by the lower-court judge.'" *Id.* at 224 (quoting State v. Nordstrom, 529 A.2d 107, 111 (R.I. 1987)).
35. *Id.* at 225.
36. *Id.* at 224-25 (quoting Jacksonbay Builders v. Azarmi, 869 A.2d 580, 584 (R.I. 2005)) (emphasis added).
37. *Id.* at 225 (citing Pioneer Inv. Servs. v. Brunswick Assocs. Ltd., 507 U.S. 380, 389 (1993)).
38. *Id.* (quoting *Pioneer*, 507 U.S. at 395).
39. *Id.* (quoting Pari v. Pari, 558 A.2d 632, 635 (R.I. 1989)).

arisen regarding the necessity to appear in court.[40] The fact that Murray told Carrasco to "forget about court," that Carrasco transferred $200 to her checking account immediately after the phone conversation, and that she attended all previous court hearings, pointed to the fact that defendants' failure to attend the April 10, 2003 hearing was a direct result of Carrasco's conversation with Murray, a conversation that would never have occurred had Murray not violated the anti-contact rule.[41]

The Supreme Court additionally held that the lower court did not abuse its discretion by allowing defendants the opportunity to redeem their property because defendants presented a meritorious defense to set aside a default judgment.[42] The Court noted the well-established rule that, when moving to set aside a default judgment due to excusable neglect, defendants must show that they have "'a prima facie meritorious defense which [they] desire in good faith to present at the trial.'"[43] Here, defendants presented evidence that they had sufficient funds in other bank accounts to cover the two checks that were owed to plaintiff.[44] The Superior Court found this evidence to be a sufficient meritorious defense, granted defendants' motion to vacate, and the Supreme Court affirmed.[45]

Finally, the Supreme Court held that the lower court "did not err or abuse [its] discretion in assessing the redemption amounts" and affirmed the lower court's judgment awarding plaintiff $5,371.[46] The Court rejected plaintiff's argument that it was entitled to be made "whole" and receive all of the property taxes it paid, plus interest, the amount of its expenditures for repairs and capital improvements, attorney's fees, and certain rents collected by defendants.[47] Instead, the Court agreed with defendants that the amount of redemption costs should be determined by the redemption agreement.[48] As the Court noted, this "was not a

40. *Id.* at 225-26.
41. *Id.*
42. *Id.* at 226.
43. *Id.* (quoting Shannon v. Norman Block, Inc., 256 A.2d 214, 219 (R.I. 1969)).
44. *Id.*
45. *Id.*
46. *Id.* at 227.
47. *Id.* at 226-27.
48. *Id.* at 227.

typical redemption case under § 44-9-29," under which plaintiff may have been able to redeem "'costs, penalties, and all subsequent taxes, costs and interest to which petitioner [was] entitled.'"[49] Rather, because the parties entered into an agreement prior to any ruling on the foreclosure petition, that agreement, and not the Rhode Island tax sale statute, controlled the redemption terms.[50] Since the agreement did not contain any terms relating to taxes, rents, capital improvements, or attorney's fees, no such fees were owed to plaintiffs.[51] The Court explained that when the lower court "vacated the default decree and ordered redemption, he simply put the parties back into their pre-fault positions."[52]

COMMENTARY

A majority of the Supreme Court's opinion was dominated by criticism of the numerous errors committed by the Superior Court on remand. First, the Supreme Court expressed great frustration with the inability of the Superior Court to correctly interpret their mandate.[53] The Court pointed out that its opinions "'speak forthrightly and not by suggestion or innuendo'"[54] and lower courts "'may not exceed the scope of the remand or open up the proceeding to legal issues beyond remand.'"[55] This "mandate rule" prevents lower courts from examining or varying any issues already settled by the Supreme Court and instructs such courts to rule only on the remanded issues.[56] In no uncertain terms, the Court chastised the lower court for "further cloud[ing] the landscape of this case" and expressed "disappointment" with the lower court for not following the Supreme Court's direction to "determine whether Murray's violation of the anti-contact rule occasioned excusable neglect by defendants to an extent sufficient to vacate the default."[57] Instead of accepting the mandate to

49. *Id.* (quoting R.I. GEN. LAWS § 44-9-29 (1956)).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 222.
54. *Id.* at 223 (quoting Fracassa v. Doris, 876 A.2d 506, 509 (R.I. 2005)).
55. *Id.* (quoting Willis v. Wall, 941 A.2d 163, 166 (R.I. 2008)).
56. *Id.* (quoting U.S. v. Thrasher, 483 F.3d 977, 981 (9th Cir. 2007)).
57. *Id.* at 222.

decide this "narrow issue," the Superior Court "held an in-depth evidentiary hearing that ultimately led [it] to rule, in direct contradiction of [the Supreme Court], that Murray did not violate the anti-contact rule."[58] By deciding on issues not before it, the Superior Court committed "clear error," which is why the Supreme Court took matters into its own hands and, to avoid another remand, ruled that sufficient evidence existed to conclude that there was excusable neglect by defendants.[59]

Second, the Supreme Court noted that it "would be remiss if [it] did not point out the flawed reasoning behind [the lower court's] ruling" that, even though defendants' counsel was negligent in not contacting Murray after his conversation with her client and in failing to attend the hearing, defendants themselves should not be held responsible for their attorney's negligence.[60] The Supreme Court pointed out that it is a "'fundamental of agency law'" that "'the neglect of an attorney in professional matters'" is imputed to that attorney as though it was "'the neglect of the client himself.'"[61] Thus, pending "'extenuating circumstances of sufficient significance,'" defendants would "'not be relieved of a default judgment resulting from the failure of [their] counsel to comply with procedural requirements.'"[62] The Supreme Court stated that, since no such extenuating circumstances existed in the present case, the lower court's reasoning was erroneous and was an insufficient reason for vacating the default decree.[63]

CONCLUSION

The Rhode Island Supreme Court affirmed the Superior Court's vacation of the default entered against defendants for their breach of redemption agreement because defendants demonstrated excusable neglect sufficient to justify such vacation. The Court additionally affirmed the Superior Court's judgment on the issue of redemption costs owed to plaintiff, holding that such costs were correctly calculated as per the parties' redemption

58. *Id.* at 222-23.
59. *Id.* at 225.
60. *Id.* at 224 n.12.
61. *Id.* (quoting King v. Brown, 235 A.2d 874, 875 (R.I. 1967)).
62. *Id.* (quoting *King*, 235 A.2d at 875).
63. *Id.*

agreement.

Natasha Rabinovich

Property Law. *Tidewater Realty, LLC v. State of Rhode Island and Providence*, 942 A.2d 986 (R.I. 2008). When a city has an option to purchase previously condemned land under R.I. GEN. LAWS § 37-7-3 (1956), it is not required to be "an active participant in the process" of the sale to a third party until an agreement has been reached, at which time the city may then choose to accept the agreement or waive its statutory rights.[1] Additionally, under R.I. GEN. LAWS § 45-32-5(a)(4)(1956), the Providence Redevelopment Agency (PRA) has the authority to purchase property "within the redevelopment area or for the purposes of redevelopment."[2] To qualify as a redevelopment area, land must be "blighted and substandard."[3]

FACTS AND TRAVEL

The State of Rhode Island (hereinafter "the state") originally acquired the commercial waterfront property in dispute, an approximately five-acre plot located at 242 Allens Avenue in Providence (hereinafter "the property"), by condemnation.[4] As such, when the state decided to sell the property in 2004, it was required under R.I. GEN. LAWS § 37-7-3 (1956) to grant a right of first refusal to whomever owned the land when it was condemned and, if that right is not utilized, the "city or town wherein the land or property is situated" must be granted a second option to purchase the property with the same terms and conditions under which a third party is willing to purchase the property.[5]

In February, 2004, the state informed numerous public agencies that it was going to sell the property and asked that the agencies reply with any objections.[6] The City of Providence Director of Planning and Development replied with a handwritten

1. Tidewater Realty, LLC v. State of Rhode Island and Providence, 942 A.2d 986, 995 (R.I. 2008).
2. R.I. GEN. LAWS § 45-32-5(a)(4) (1956).
3. *Tidewater Realty*, 942 A.2d at 998.
4. *Id.* at 989.
5. R.I. GEN. LAWS § 37-7-3 (1956).
6. *Tidewater Realty*, 942 A.2d at 990.

note stating that the City of Providence (hereinafter "the city" or "Providence") would be interested if the present tenant of the property was not interested.[7] The present tenant, Promet Marine Services Corporation, has operated a successful shipyard and ship repair facility on the property for over thirty years and has a lease until 2011, with an option to extend until 2021.[8] Promet was interested in purchasing the property and formed Tidewater Realty, LLC (hereinafter "Tidewater"), the plaintiff, for the purpose of pursuing the purchase.[9]

After it won a protracted bidding process, Tidewater finalized a purchase contract with the state.[10] The contract listed a purchase price of $1,026,780 and a closing date of June 30, 2005 at the latest.[11] It also included a clause terminating the contract if "the City of Providence" exercised its right under R.I. GEN. LAWS § 37-7-3 (1956).[12] The city had thirty days from May 18, 2005 to exercise its option.[13]

On June 17, 2005, the Providence City Council instructed the PRA to acquire the property as its agent because the city could not complete the transaction by the closing date.[14] The state then terminated its contract with Tidewater and, over Tidewater's objections, conveyed the property to the PRA.[15] Tidewater proceeded to seek a declaratory judgment that the state's conveyance to the PRA was null and void because the section 37-7-3 procedures were not followed, the city could not delegate an agency to assert its right, and the purchase of the property was not within the PRA's limited statutory powers.[16] Tidewater also filed a two-count complaint contending that the state breached their contract because it sold the property to the PRA instead of the "City of Providence" as stated in the right to terminate clause.[17] Tidewater's second count contended that the city and

7. *Id.*
8. *Id.* at 989.
9. *Id.* at 990.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 991.
15. *Id.*
16. *Id.*
17. *Id.*

the PRA tortiously interfered with its contract with the state.[18]

The state, the city, and the PRA moved to dismiss the complaint for failure to state a claim for which relief could be granted.[19] In the alternative, they moved for summary judgment contending that there was no issue of material fact.[20] The Superior Court denied Tidewater's claim for declaratory relief, stating that the city did not clearly, decisively, and unequivocally waive it's statutory right and that the city may empower an agency to assert its right to purchase.[21] The court also granted summary judgment to the defendants for both counts of Tidewater's complaint.[22] It found that the state properly terminated the contract with Tidewater per the contract terms and that the city and the PRA did not tortiously interfere with Tidewater's contract because, under the Rhode Island Supreme Court's decision in *Belliveau Building Corp. v. O.Coin*, the city and the PRA had "a colorable property interest at stake."[23] On appeal, Tidewater contends that the city waived it's right to purchase the property, that the city did not have the authority to delegate its right to purchase to the PRA, and that the PRA did not have the authority to purchase the property.[24]

HOLDING AND ANALYSIS

The Rhode Island Supreme Court first resolved that because it was reviewing a grant of summary judgment and statutory interpretations, the standard of review was *de novo*.[25]

Tortious Interference with Contractual Relations

The Rhode Island Supreme Court recently made clear in *Belliveau Building Corp.* that there is no tortious interference

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18. *Id.*
19. *Id.*
20. *Id.*
21. Tidewater Realty, LLC v. State, No. C.A. PC 05-3316, 2000 WL 34601782, at *4 (R.I. Super. Feb. 15, 2006).
22. *Id.* at *5.
23. *Tidewater Realty*, 942 A.2d at 991-92; Belliveau Building Corp. v. O'Coin, 763 A.2d 622, 629 (R.I. 2000); *Tidewater Realty*, No. C.A. PC 05-3316, 2000 WL 34601782, at *4.
24. *Tidewater Realty*, 942 A.2d at 992.
25. *Id.*

with contractual relations unless the interference was improper.[26] In that case, the Court further expounded that "a rival claimant's good faith assertion of a colorable property interest, when properly communicated by appropriate means . . . is privileged and constitutes a defense to a claim of tortious interference with contract."[27]

The Court noted that Tidewater did not argue that the city and PRA's interference was improper, nor did they attempt to distinguish *Belliveau Building Corp.*[28] As such, the Court affirmed the grant of summary judgment because it found, absent any argument to the contrary, the city and the PRA had a colorable property interest and asserted their interest in good faith.[29]

The City of Providence's Waiver of Its Rights under section 37-7-3

Though Tidewater argued that whether the city waived its rights under section 37-7-3 is a question of fact, the Court observed that Tidewater could point to no facts that are in dispute.[30] The issue was thus suitable for a summary judgment ruling because "all that remained was a legal determination of whether the city's actions and inactions . . . constituted a legal waiver of the city's rights under section 37-7-3."[31]

Addressing first the Providence Director of Planning and Development's handwritten note that the city was not interested in purchasing the property if Tidewater was going to purchase it, the Court found that the Director lacked the authority to bind the city.[32] Further, even if Tidewater relied on the Director's apparent authority to bind the city, it would not be enough to constitute a waiver of the city's right to purchase.[33]

The Court also found unpersuasive Tidewater's argument that the city waived its right to purchase by failing to get involved

26. *Belliveau Building Corp.*, 763 A.2d at 629.
27. *Id.*
28. *Tidewater Realty*, 942 A.2d at 993 n.5.
29. *Id.* at 993.
30. *Id.*
31. *Id.* at 994.
32. *Id.* at 995.
33. *Id.*

in the sale process between its initial notice and the certified notice.[34] "[W]aiver is the voluntary, intentional relinquishment of a known right."[35] Under section 37-7-3, the city must accept or reject the purchase of the property on the same terms and conditions that Tidewater and the state agreed upon.[36] "The only way the city knowingly could waive its rights under the statute was to do so *after* those terms and conditions had been negotiated."[37] Thus, even if the Director had the actual authority to waive the city's right to purchase the property, he had no knowledge at that point of the terms and conditions of the agreement between the state and Tidewater and could not have waived a known right.[38]

The PRA's Authority to Purchase the Property

The purpose and power of the PRA is set out by the Redevelopment Act of 1956.[39] R.I. GEN. LAWS 45-32-5(a)(4)(1956) allows the PRA to purchase property "within the redevelopment area or for purposes of redevelopment."[40] The PRA argued that the property was in a redevelopment area and was purchased for the purpose of redevelopment.[41] However, the Court rejected both of the PRA's contentions.[42]

A redevelopment area is defined by the Act as "any area of a community which its legislative body finds is a blighted and substandard area whose redevelopment is necessary to effectuate the public purposes declared in this chapter."[43] The city and the PRA presented the Court a map of the redevelopment areas of the city, on which eighty percent of Providence was included in four redevelopment areas.[44] Additionally, neither defendant contended that the property in dispute was "blighted or

34. *Id.*
35. *Id.* (quoting Sturbridge Home Builders, Inc. v. Downing Seaport, Inc., 890 A.2d 58, 65 (R.I. 2005)).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 996.
40. *Id.* at 996-97.
41. *Id.*
42. *Id.*
43. *Id.* (quoting R.I. GEN. LAWS § 45-31-8(15)(1956)).
44. *Id.* at 998 n.10.

substandard."[45] The Court reasoned that allowing the PRA to obtain almost any property in the city regardless of whether the property met the standards for a "redevelopment area" under the statute would render the statute meaningless, particularly when considering that the purpose of the PRA is to "prevent[] and eliminat[e] blighted areas."[46]

The Court also quickly rejected the PRA's contention that the property was purchased for a redevelopment purpose. The Act defines "redevelopment" as "the elimination and prevention of the spread of blighted and substandard areas."[47] The City Council instructed the PRA to "acquire the Property directly and to hold, own, and manage such Property for the interest of the city."[48] The Court noted that the City Council's instruction and the plaintiff's long-term lease on the property would leave the PRA with the role of merely collecting rent, which does not meet the statutory definition of redevelopment because it does not contribute to "prevent[ing] and eliminat[ing] blighted areas within the City of Providence."[49] Because the Court found the conveyance invalid, it did not address Tidewater's other arguments.[50]

As the Court found the PRA did not have the authority to purchase the property, the state's conveyance of the property to the PRA was a breach of its contract with Tidewater.[51]

COMMENTARY

The outcome of *Tidewater Realty* cuts back the broad, unchecked powers Providence and the PRA have enjoyed in the past. At a City Council meeting after the case was decided, a member of the PRA discussed the threat the case poses to the city's current land acquisition strategies and gave examples of properties it had acquired in the past that it would not have been able to under the *Tidewater Realty* decision, such as the purchase

45. *Id.* at 998 (quoting R.I. GEN. LAWS § 45-31-8(15)(1956)).
46. *Id.* at 998.
47. *Id.* at 997 (quoting R.I. GEN. LAWS § 45-31-8(14)(1956)).
48. *Id.* at 997 (quoting Providence, R.I. City Council Resolution § 4 (June 17, 2005)).
49. *Id.* at 998.
50. *Id.* at 996 n.8.
51. *Id.* at 996.

of the Civic Center.[52] The council member also claimed that Tidewater's ownership and maintenance of the property as an industrial area "harms the city in its efforts to expand the tax base" because the city could have used the property in its Comprehensive Plan to turn that portion of Allens Avenue into a mixed use area to include condominiums, hotels, restaurants, and shopping areas. This property has particular value to the city because it is adjacent to land owned by a prominent developer who would like to develop the property to include condominiums, restaurants, a marina, a hotel, a parking garage, and green space.[53]

However, the Rhode Island Supreme Court did not change the city or the PRA's authority to acquire property. In fact, the Court recognized the importance of the PRA's mission of eliminating blighted areas of the city.[54] The Court merely stated that the PRA is required to follow the "prescribed statutory requirements and procedures before it exercises its broad powers."[55] The Redevelopment Act sets out very particular requirements and procedures for property acquisition by the PRA in order to protect the public from misuse of power.[56]

The city has met substantial resistance in its endeavor to change the character of the waterfront area and took advantage of this situation as a way to bypass the exhaustive procedures proscribed on its route to attaining its goals. It abused the PRA's powers in an attempt to further its own plans at the expense of the citizens of Providence. In declaring that "the vehicle of acquisition is less significant than the importance of the PRA following its prescribed statutory requirements," the Court took great strides in preventing abuse of power and protecting public

52. Daniel Barbarisi, *Supreme Court Rules Against Providence in Land Purchase*, THE PROVIDENCE JOURNAL, ¶ 2 (March 21, 2008), http://www.projo.com/ri/providence/content/MC_COUNCIL_3-21-08_R59FC1K_v7.39c52c2.html.

53. *Id.* (quoting City Councilman Luis Aponte).

54. *Tidewater Realty*, 942 A.2d at 996-97.

55. *Id.* at 997; Barbarisi, *supra* note 52; Elizabeth Abbott, *In Providence, a Waterfront Promoter Finds Opponents*, THE NEW YORK TIMES, ¶ 1 (December 26, 2007), http://www.nytimes.com/2007/12/26/business/26port.html.

56. R.I. GEN. LAWS § 45-32-5(a)(4) (1956).

interest.[57]

Providence has made several attempts to circumvent the Court's decision in *Tidewater Realty*. The city requested that the Rhode Island Supreme Court reconsider the case and intended to argue that Tidewater's shipyard and ship repair facility was blighted by environmental standards.[58] However, the Environmental Protection Agency and the Department of Environmental Management has found the business to be in full compliance with industry guidelines and the business has no citations on record.[59] The Court was not persuaded by the city's argument and rejected its request.[60]

The city also attempted to amend Rhode Islands General Laws to avoid litigation over previous land that the PRA was not statutorily authorized to acquire under *Tidewater Realty* and to make it easier for the PRA to acquire land in the future.[61] The proposed amendment to R.I. GEN. LAWS § 45-31-17 declared legal "[a]ll ordinances, resolutions, official acts, and determinations, relating to or arising out of the establishment of redevelopment areas. . .by any community or redevelopment agency."[62] Additionally, the proposed amendment to R.I. GEN. LAWS § 45-32-4 states that any area that is designated a redevelopment area by the city "shall constitute a finding by the legislative body that the areas. . .are blighted and substandard."[63] The amendment, combined with the City Council's declaring over eighty percent of Providence a redevelopment area, would give the PRA a sweeping power to acquire nearly any property in the city regardless of whether the land is actually blighted and substandard, and regardless of whether the PRA intended to fulfill it's purpose of eliminated blighted and substandard areas. At the close of the 2008 General Assembly, the proposed amendment had not been

57. *Tidewater Realty*, 942 A.2d at 997.

58. Barbarisi, *supra* note 52; Chris Hunter, *Interview with Providence Working Waterfront Alliance*, www.sustainableprovpiers.com/docs/wwainterview.doc.

59. *Id.*

60. Barbarisi, *supra* note 52.

61. *Tidewater Realty*, 942 A.2d at 999; S. 2967, Gen. Assem., Reg. Sess. (R.I. 2008).

62. S. 2967, Gen. Assem., Reg. Sess. (R.I. 2008).

63. *Id.*

voted on.[64]

CONCLUSION

The Rhode Island Supreme Court held that under R.I. GEN. LAWS § 37-7-3, the city is not required to participate in the sale of property to a third party until an agreement has been reached, at which time the city may then choose to accept the agreement or waive its statutory rights. The Court also held that under the R.I. GEN. LAWS § 45-32-5(a)(4), land does not qualify as a redevelopment area acquirable by the PRA unless it is "blighted and substandard."

Dana Merkel

64. S. 2967, Gen. Assem., Reg. Sess. (R.I. 2008) (Legislative Status Report).

Statutory Interpretation. *Palazzo et al. v. Alves*, 944 A.2d 144 (R.I. 2008). The Rhode Island Supreme Court addressed the manner a party may seek damages after being named as a defendant in a "strategic lawsuit against public participation," or a "SLAPP" suit. A SLAPP suit is a lawsuit brought primarily to discourage a valid exercise of First Amendment rights. The Rhode Island Supreme Court determined Rhode Island's anti-SLAPP statute cannot reasonably be read to provide a mechanism by which a party may file a separate "SLAPP-back" suit against the original plaintiff or plaintiffs.

FACTS AND TRAVEL

The conflict at issue began with an earlier lawsuit between the parties.[1] In 2001, Senator Stephen D. Alves (the defendant) filed a civil suit against Alan G. and William B. Palazzo (collectively, the plaintiffs), alleging certain statements made by the plaintiffs at public meetings, and written in letters to the editor of a local newspaper, were slanderous and libelous, and placed him in a false light.[2] In response, the plaintiffs filed a motion to dismiss, claiming the defendant's lawsuit was a SLAPP suit, and seeking "costs and attorneys' fees pursuant to. . . the anti-SLAPP statute."[3]

The Superior Court concluded the plaintiff's motion to dismiss should be treated as a motion for summary judgment, and granted summary judgment in favor of Alan Palazzo, awarding him costs

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1. Palazzo et al. v. Alves, 944 A.2d 144, 147 (R.I. 2008) (citing Alves v. Hometown Newspapers, Inc., 857 A.2d 743 (R.I. 2004)).

2. *Id.*

3. *Id.* at 147, 148. "The relevant portion of the anti-SLAPP statute provides: If the court grants the motion asserting the immunity established by this section, *** the court *shall* award the prevailing party costs and reasonable attorney's [sic] fees ***. The court *shall* award compensatory damages and *may* award punitive damages upon a showing by the prevailing party that the responding party's claims, counterclaims or cross-claims were frivolous or were brought with an intent to harass the party or otherwise inhibit the party's exercise of its right to petition or [to] free speech under the United States or Rhode Island constitution." *Id.* at 151 (citing R.I. GEN. LAWS, § 9-33-2(d) (emphasis added).

and reasonable attorneys' fees.[4] In regard to William Palazzo, the summary judgment motion was denied, but the claims against him were eventually settled.[5]

The defendant appealed the decision regarding Alan Palazzo to the Rhode Island Supreme Court, and the Court affirmed the lower court's decision.[6] Thereafter, the defendant and Alan Palazzo "agreed that the judgment would be satisfied by. . . $33,000, which would be deemed to include costs and interest."[7] However, a few months later the plaintiffs filed the action at issue in this case against the defendant, alleging the original suit was brought to interfere with their constitutional rights of free expression, with an intent to harass, and was frivolous.[8] The plaintiffs also alleged malicious prosecution and abuse of process, and requested compensatory and punitive damages, costs, interest and reasonable attorneys' fees.[9]

The defendant filed a motion to dismiss, claiming the plaintiffs' suit was barred by *res judicata* and collateral estoppel, and that the plaintiffs "should have raised the claims. . . as compulsory counterclaims in the original action."[10] The hearing justice granted the motion, and held that the anti-SLAPP statute did not provide for further action following a determination the statute was violated.[11]

The hearing justice concluded that because the plaintiffs had not requested punitive and compensatory damages in the original action, their subsequent claim for such damages in the later action was precluded.[12] Further, the hearing justice "ruled that Alan Palazzo's claims . . . were precluded due to the fact that he had been the beneficiary of a judgment in his favor in the initial action and had thereafter agreed that said judgment could be satisfied

4. *Id.* at 147-148.
5. *Id.* at 148.
6. *Id.*
7. *Id.*
8. *See id.*
9. *Id.* The kind of lawsuit that the plaintiffs filed is referred to as a "SLAPP-back" suit, because such lawsuits "come about as reactions to earlier litigation that is allegedly of the SLAPP variety." *Id.* at 148 n.7.
10. *Id.* at 148.
11. *Id.*
12. *Id.*

by. . . the sum of $33,000."[13] Additionally, "[w]ith respect to William Palazzo, the hearing justice found that. . . the proper method would have been to raise the anti-SLAPP [s]tatute and prosecute the claim rather than. . . settle the suit. . . and then file a subsequent lawsuit."[14]

On appeal to the Rhode Island Supreme Court, the plaintiffs "contend[ed] that the anti-SLAPP statute provides for a two-step process."[15] Under the plaintiffs' reading of the statute, the first step is requesting conditional immunity in a civil action pursuant to the anti-SLAPP statute.[16] "[I]f that defendant's claim. . . is upheld, the court will dismiss the plaintiff's complaint and will award. . . attorneys' fees and costs."[17] Next, after the dismissal of the original suit, a SLAPP defendant may choose to file a SLAPP-back suit seeking compensatory and punitive damages.[18] Additionally, the plaintiffs claimed the issues of compensatory and punitive damages, malicious prosecution and abuse of process were not barred by *res judicata*, because the issues were not before the hearing justice in the original action.[19]

BACKGROUND

The anti-SLAPP statute was enacted to thwart "'vexatious lawsuits against citizens who exercise their First Amendment rights'. . .'by granting. . . conditional immunity from punitive civil claims.'"[20] "[W]hen conditional immunity attaches, it renders 'the petitioner or speaker immune from any civil claims for statements, or petitions, that were not. . . objectively or subjectively baseless.'"[21] "When permitted, 'SLAPP-back suits' are countersuits filed by SLAPP victims in which damages are sought from the original plaintiff for abusing the legal process, for malicious prosecution, and/or for interference with the exercise of

13. *Id.* at 148-149.
14. *Id.* at 149.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 150 (citing Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 752 (R.I. 2004)).
21. *Id.* at 150 (citing Global Waste Recycling, Inc. v. Mallette, 762 A.2d 1208, 1211 (R.I. 2000)).

constitutional rights of free expression."[22]

ANALYSIS AND HOLDING

On appeal, the Rhode Island Supreme Court affirmed the judgment of the Superior Court.[23] The Court determined the anti-SLAPP statute clearly provides "that, *in the same civil action* in which a party has successfully invoked the. . . statute, the court in that case 'shall award compensatory damages and may award punitive damages. . .'"[24] In so deciding, the Court noted that "both sentences in the relevant statutory language refer to what *the court* may or shall do if certain criteria are met with respect to the civil action before the court," and the Court understood "that term to refer to the court in which the anti-SLAPP defense was raised."[25] The Court also noted that "[t]here is no suggestion in the statute that there should subsequently be a separate civil action."[26]

The Court concluded that "the overall objective of the anti-SLAPP statute [is] to provide for a quick resolution with minimal costs."[27] The Court acknowledged that a two-step process was required prior to the enactment of the anti-SLAPP statute, but held that "[t]his process changed with the enactment of the. . . statute."[28] The Court stated that, in the original civil action, the plaintiffs filed a motion in which they sought costs and attorneys' fees, and that "[n]othing prevented them from also seeking compensatory and punitive damages in that same motion or upon being notified that their. . . motion had been granted."[29]

The Court held that "[b]y not requesting compensatory and punitive damages in the original civil action, [the plaintiffs']

22. *Id.* at 148 n.7 (citing John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L.REV. 395, 431-32 (1993); Edmond Constantini and Mary Paul Nash, *SLAPP/SLAPP-back: The Misuse of Libel Law For Political Purposes and a Countersuit Response*, 7 J.L. POL. 417, 423 (1991)).
23. *Id.* at 144.
24. *Id.* at 151.
25. *Id.*
26. *Id.*
27. *Id.* at 152.
28. *Id.* at 151.
29. *Id.* at 152.

claims for such damages are deemed to have been waived."[30] The plaintiffs' claims were barred by *res judicata* because the doctrine "makes a prior judgment in a civil action between the same parties conclusive with regard to any issues. . . that *could have been litigated or presented therein.*"[31]

The Court also held that "the hearing justice properly granted the motion to dismiss with respect to the [plaintiffs'] malicious prosecution claim."[32] The Court reasoned that because "[t]he anti-SLAPP statute provides for recovery of damages identical to those. . . available in tort," "to allow recovery under both the anti-SLAPP statute and a malicious prosecution claim would constitute double recovery."[33]

Further, the Court determined that even if the plaintiffs were allowed to maintain a separate malicious prosecution action, the plaintiffs would not be able to state a claim upon which relief could be granted.[34] Alan Palazzo "failed to assert an essential element of a malicious prosecution claim" because he did not allege any special injury.[35] Further, in the case of William Palazzo, relief could not be granted because a settlement will not support a claim for malicious prosecution.[36] In fact, the Court noted that they gave "serious consideration to sanctioning William Palazzo and his counsel" because "[a]s a matter of black letter law, his malicious prosecution claim was doomed from the outset." As such, the filing of the suit raised questions as to whether the parties acted in good faith.[37]

As to the abuse of process claim, the Court described the plaintiffs' allegations as "conclusory and non-specific."[38] The Court determined that "nothing in the record even suggests that [the defendant] used the initial suit for an ulterior or wrongful

30. *Id.*
31. *Id.* (citing ElGabri v. Lekas, 681 A.2d 271, 275 (R.I. 1996) (emphasis added)).
32. *Id.* at 153.
33. *Id* (citing Graff v. Motta, 695 A.2d 486, 492 (R.I. 1997); Vallinoto v. DiSandro, 688 A.2d 830, 842 (R.I. 1997)).
34. *Id.*
35. *Id.* at 154.
36. *Id.* at 153, 154 (citing Toste Farm Corp.v. Hadbury, Inc., 798 A.2d 901, 908 (R.I. 2002)).
37. *Id.* at 153 n.16.
38. *Id.* at 154 n.17.

purpose."[39] Accepting all of the allegations as true, the Court concluded "the plaintiffs would not be entitled to relief under any conceivable set of facts."[40]

COMMENTARY

Rhode Island Lawyers Weekly ranked *Palazzo, et al. v. Alves* as one of 2008's ten most important opinions.[41] This is likely because the Rhode Island Supreme Court had never previously construed the anti-SLAPP statute with respect to the issues discussed in the opinion.[42] Interestingly, however, the Supreme Court made it clear this was far from a difficult case for them to decide.

The Court stated "[w]e would have thought that venerable principals of American jurisprudence. . . not to mention the straightforward language of [the statute], would have counseled against the commencement of this civil action."[43] In fact, the Court found it to be "more than a little disturbing" that the action was appealed to the level it was.[44]Thus, the Court gave "serious consideration to imposing sanctions even in the absence of a motion for the same."[45]

To the Court it was "utterly apparent that the [anti-SLAPP] statute envisions a unitary proceeding – one in which all contentions of the parties would. . . be 'wrapped up.'"[46] However, the fact that the editors at Rhode Island Lawyers Weekly believed this opinion was so important leads one to wonder if, prior to this case, the statute was so abundantly clear to everyone. Although the statute does seem relatively unambiguous, this author wonders if the Court's evident frustration with the procedure the plaintiffs utilized (ie: a SLAPP-back suit) was exacerbated by sloppy pleading and a lack of underlying merit in the plaintiffs' claims.

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39. *Id.* at 154.
40. *Id.*
41. Vol. 29, Issue No. 35, January 5, 2009 at *1.
42. *Id.* at 154.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 151.

CONCLUSION

The Rhode Island Supreme Court held that offended parties may not seek to recover SLAPP-related damages in "a subsequent civil action that is. . . separate from the initial civil action in which they prevailed on a dispositive motion based on the anti-SLAPP statute."[47] "[I]f a party chooses to assert conditional immunity under the [anti-SLAPP] statute by filing a dispositive motion, he or she must assert at that time all claims which said party believes accrue to him or her by virtue of what that party deems to be the improper speech related counts in the underlying action."[48]

Sally P. McDonald

47. *Id.*
48. *Id.* at 153 n. 14.

Statutory Interpretation. *Such, et al. v. State*, 950 A.2d 1150 (R.I. 2008). The Rhode Island Supreme Court held that two seemingly contradictory bills were not irreconcilably repugnant to one another and could therefore both be given effect within Rhode Island General Laws § 31-27-2.1 (1956), which the bills sought to amend. Plaintiffs were suspected of operating motor vehicles under the influence of drugs or alcohol within Rhode Island, refused to submit to chemical tests, and disputed the resulting imposition of penalties set forth in R.I. Gen. Laws § 31-27-2.1, as amended by the challenged bills. The Court found that both bills were enacted during the same legislative session, were related not only to the same subject matter, but to the same statute, and were meant to achieve two distinct and reconcilable objectives. Moreover, the Court noted that the order in which the Governor's signature appeared on multiple bills was not relevant to a determination of whether one bill repealed another.

FACTS AND TRAVEL

R.I. Gen. Laws § 31-27-2.1 (1956) [hereinafter "refusal statute"] criminalizes the refusal of any operator of a motor vehicle suspected of driving under the influence of drugs or alcohol in Rhode Island to submit to "chemical tests of his or her breath, blood, and/or urine for the purpose of determining the chemical content of his or her body fluids or breath."[1] Members of the House of Representatives proposed a bill on January 3, 2006 designated as 2006-H 6700, which amended the refusal statute by imposing increased penalties for its violation.[2] The bill was passed by the Senate on June 23, 2006, by the House on June 24, 2006, and signed into law by the Governor on June 28, 2006 as 2006 R.I. Pub. Laws ch. 232 [hereinafter "refusal bill"].[3] On

1. R.I. GEN. LAWS § 31-27-2.1 (1956).

2. Such, et al. v. State, 950 A.2d 1150, 1152-53 (R.I. 2008) ("[T]he range for a license revocation increased from a span of three to six months to a span of six months to a year," and "second and third offenders became subject to criminal liability, increased fines, and more community service.").

3. *Id.*

February 8, 2006, members of the House proposed another bill, 2006-H 7120, which was passed by the House on June 19, 2006, by the Senate on June 23, 2006, and signed into law by the Governor on July 1, 2006 as 2006 R.I. Pub. Laws ch. 246 [hereinafter "budget bill"].[4] Article 10 of the budget bill duplicated the language of the refusal statute as it had existed prior to the enactment of the refusal bill, and added only a new subsection, § 31-27-2.1(b)(6), which assessed a two hundred dollar fine against those in violation of the statute, to support the state's chemical testing programs.[5]

In the fall of 2006, each of the three plaintiffs were suspected of drunk driving by police officers, refused to submit to chemical testing for drugs or alcohol, and were subsequently penalized in accordance with the refusal bill.[6] One of the drivers, Mr. Such, was granted a continuance by the Rhode Island Traffic Tribunal so that he could petition the Superior Court for a declaratory judgment with respect to alleged inconsistencies between the refusal bill and the budget bill.[7] The Superior Court granted the other drivers' motions to intervene and agreed with the plaintiffs' argument that the budget bill, which was signed after the refusal bill and reproduced the refusal statute in its entirety without including the new penalties set forth in the refusal bill, implicitly repealed the statutory amendments made by the refusal bill.[8] The Superior Court granted plaintiffs' summary judgment motion, reasoning that penal statutes should be interpreted in favor of those against whom the penalties are imposed and that "when a conflict exists between two statutes, the last in time controls."[9] The State timely appealed to the Rhode Island Supreme Court.[10]

ANALYSIS AND HOLDING

The Supreme Court reviewed the statutory interpretation

4. *Id.*
5. *Id.; See* 2006 R.I. Pub. Laws ch. 246.
6. *Such*, 950 A.2d at 1153-54.
7. *Id.* at 1154.
8. *Id.* at 1154-55.
9. *Id.* at 1155.
10. *Id.*

issues and the summary judgment motions *de novo*,[11] and reversed the decision of the lower court, holding that "the General Assembly intended for the amendatory language in both bills to become operative in the refusal statute."[12] The Court proffered four explanations in support of its conclusion that the budget bill neither expressly nor implicitly repealed the increased penalties set forth in the refusal bill.[13]

First, the Court employed several tenets of statutory construction, recognizing the presumption that apparently inconsistent statutes relating to the same subject matter and enacted in the same legislative session should be read in relation to one another so as to avoid contradiction and to give effect to the statutes' objectives and purposes.[14] Noting that "'repeals by implication are not favored by the law,'" and that the statute enacted last-in-time will only be preferred in situations where the two statutes are irreconcilably repugnant,[15] the Court emphasized that both statutes were enacted in the same legislative session and were related to the same subject matter.[16] The plaintiffs could not defeat the resulting presumption that the amendatory language of each statute should be given effect because the object and purpose of the refusal bill, which is to increase deterrence, is not at all irreconcilably repugnant to that of the budget bill, which is to increase the Department of Health's revenue.[17]

The Court then evaluated Rhode Island's law-making process and held that the Governor does not have the constitutional power "to repeal one of two bills solely based on the chronological order he signs legislation when each bill has passed the General Assembly but neither has received his signature."[18] The plaintiffs accorded a significant amount of weight to the fact that the Governor signed the refusal bill before the budget bill.[19]

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11. *Id.*
12. *Id.* at 1157, 1159.
13. *See id.* at 1157-58.
14. *Id.* at 1156.
15. *Id.* (quoting Berthiaume v. Sch. Comm. of Woonsocket, 397 A.2d 889, 893 (R.I. 1979), quoted in McKenna v. Williams, 874 A.2d 217, 241 (R.I. 2005)).
16. *Id.* at 1157.
17. *Id.*
18. *Id.* at 1158.
19. *See id.* at 1157.

The Court noted that the General Assembly had actually passed the budget bill one day prior to passing the refusal bill, and declared the timing of the Governor's signature to be irrelevant.[20] Justice Suttell reasoned that the House and Senate should not be expected to predict the order in which the Governor could conceivably sign bills, much less base statutory amendments on such predictions.[21]

In response to the plaintiffs' next argument concerning the applicability of the rule of lenity, which requires ambiguous criminal statutes to be construed in favor of the accused, the Court held that the rule did not apply because the legislative intent of each bill was clear.[22] The lack of ambiguity with respect to the reconcilable objects and purposes of the bills barred application of the rule.[23] Finally, the Court declined to consider indicia of legislative intent offered by the parties because the statute was not ambiguous, and held that "'[w]hen the language of a statute expresses a clear and sensible meaning, this [C]ourt will not look beyond it.'"[24]

COMMENTARY

The Rhode Island Supreme Court's decision in *Such v. State* can easily be misread with regard to the Governor's constitutional power to approve or veto legislation prior to its enactment into law. The Court carefully held that the Governor's constitutional directive to sign or veto legislation upon House and Senate approval does not give him the power to repeal one of two bills based solely on the order in which they were executed by him.[25] The Court is not saying that the Governor's constitutional power to veto or approve legislation is empty or meaningless, but rather that the Governor will not be deemed to have vetoed or repealed any bill based merely on the timing of his approval of other bills. In effect, the Governor may still expressly veto any act of legislation that he disproves of, but may not repeal one by simply

20. *Id.*
21. *Id.* at 1157-58.
22. *Id.* at 1158.
23. *Id.*
24. *Id.* at 1158-59 (quoting First Republic Corp. of Am. v. Norberg, 358 A.2d 38, 41 (R.I. 1976)).
25. *Id.* at 1158.

affixing his signature to another.[26]

CONCLUSION

The Rhode Island Supreme Court reversed the Superior Court's decision and held that the refusal bill and the budget bill were not irreconcilably repugnant, and could therefore both be harmonized and given effect in the refusal statute. In so holding, the Court stressed that its purpose is to evaluate the intent of the legislature, not that of the Governor.[27] The timing of the Governor's signature was therefore not relevant to a determination of whether the budget bill repealed the refusal bill, because the bills were facially unambiguous and reconcilable.

Derek R. Cournoyer

26. *See id.*
27. *Id.*

Tort Law. *State v. Lead Industries Association, Inc.*, 951 A.2d 428 (R.I. 2008). In this decision, the Rhode Island Supreme Court consolidated five appeals and cross-appeals stemming from an action filed by the State of Rhode Island against various former lead pigment manufacturers for the creation of a public nuisance.[1] Addressing defendants' appeal of liability under the tort of public nuisance, the Court held that the trial judge erred in denying defendants' motion to dismiss because the state failed to adequately allege two requisite elements of the tort of public nuisance: (1) that defendants interfered with a right common to the general public, and (2) that defendants were in control of the product that caused the alleged nuisance at the time it harmed the citizens of Rhode Island.[2] Additionally, addressing an issue of first impression, the Court determined that the Attorney General may enter into a contingency fee arrangement with outside counsel in a civil case, so long as the Attorney General retains absolute and total control over all critical decision-making.[3]

1. *See* State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 435 (R.I. 2008). This survey addresses only the issues presented in Track I and Track V of the decision. In Track II, the Court addressed the state's cross-appeal on the issue of compensatory damages and held that because the tort of public nuisance was not a proper cause of action, the issue need not be addressed on appeal. *Id.* at 458. In Track III, the Court addressed the state's appeal of the trial justice's grant of judgment as a matter of law in favor of defendant Atlantic Richfield Co., and once again held that because the tort of public nuisance was not a proper cause of action, the issue need not be addressed. *Id.* at 458- 59. In Track IV, the Court addressed the state's appeal of contempt orders entered against the Rhode Island Attorney General in December 2005 and June 2006 and held that the Attorney General's public statements regarding the case did not support findings of civil contempt. *Id.* at 464.

2. *Id.* at 453.

3. *Id.* at 475.

DEFENDANTS' APPEAL OF LIABILITY UNDER THE TORT OF PUBLIC NUISANCE

FACTS AND TRAVEL

A. Dangers of Lead Poisoning

Until the mid-1970s, lead was commonly used in residential paint throughout the United States.[4] Lead is a toxic chemical that can have an array of effects on a child's development and behavior.[5] Contact with low levels of lead may cause permanent learning disabilities, reduced concentration and attentiveness, and behavioral problems.[6] Exposure to higher levels of lead can cause comas, convulsions, and even death.[7] Children under the age of six are particularly susceptible to lead poisoning because their growing bodies tend to absorb more lead, and their brains and nervous systems are more sensitive to it.[8] Throughout the nation, children are most often lead-poisoned by consuming lead paint chips from deteriorating walls or inhaling lead-contaminated surface dust.[9]

B. Lead Poisoning and Legislative Responses in Rhode Island

With a housing stock of older homes, childhood lead poisoning has been a significant problem throughout Rhode Island. From January 1993 to December 2004, at least 37,363 children were poisoned by exposure to lead paint.[10] As of 2004, a total of 1,685 children in Rhode Island were affected.[11] Of this number, 1,167

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4. *Id.* at 437 (citing Office of Lead-Based Paint Abatement and Poisoning Prevention, 61 Fed. Reg. 29170, 29171 (June 7, 1996)).

5. *Id.*

6. *Id.* (citing R.I. GEN LAWS § 23-24.6-2(1) (2001)).

7. *Id.* (citing Office of Lead-Based Paint Abatement and Poisoning Prevention, 61 Fed. Reg. at 29170).

8. *Id.*

9. *Id.* (citing Preventing Lead Poisoning in Young Children, CDC, U.S. Department of Health and Human Services, Atlanta, Georgia (1991); Rabinowitz, M. et al., *Environmental Correlates of Infant Blood Lead Levels in Boston, Environmental Research* 38: 96-107 (1985)).

10. *Id.* at 437-38 (citing testimony of the former director of the Rhode Island Department of Health, Patricia A. Nolan, M.D.).

11. *Id.* at 438 (citing Rhode Island Department of Health, *Childhood*

children were newly poisoned in 2004.[12]

The Rhode Island General Assembly has enacted two provisions aimed at reducing childhood exposure to lead – the Lead Poisoning Prevention Act[13] (LPPA) and the Lead Hazard Mitigation Act[14] (LHMA). Nevertheless, the rate of childhood lead poisoning in Rhode Island is more than double the national average.[15]

C. The Attorney General's Lawsuit

On October 12, 1999, the Attorney General of Rhode Island filed a suit on behalf of the citizens of Rhode Island against a number of former lead pigment manufacturers and the Lead Industries Association.[16] The state asserted that defendants were liable under nine separate causes of action, including the tort of public nuisance.[17] The state's complaint relative to its public nuisance claim alleged that "[d]efendants created an environmental hazard that continues and will continue to unreasonably interfere with the health, safety, peace, comfort or convenience of the residents of the [s]tate, thereby constituting a public nuisance."[18]

In January 2000, defendants moved to dismiss all counts of the state's complaint.[19] With respect to the state's public

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Lead Poisoning in Rhode Island: The Numbers 2005 Edition 4, 19) [hereinafter, *The Numbers 2005*].

12. *Id.* (citing *The Numbers 2005*).

13. R.I. GEN LAWS § 23-24.6-3 (2001). (The LPPA's stated purpose was to establish "a comprehensive program to reduce exposure to environmental lead and prevent childhood lead poisoning, the most severe environmental health problem in Rhode Island.")

14. R.I. GEN LAWS § 42-128.1-8(a) (2006). (The LHMA mandates that owners of rental properties constructed prior to 1978 correct any lead hazards on their premises.)

15. *Id.* at 438 (citing *The Numbers 2005*). Whereas the national average of lead paint poisoning in children is 2.2 percent, in Rhode Island the rate is 5 percent. *The Numbers 2005.*

16. *Id.* at 439.

17. *Id.* The state asserted defendants were liable under the theories of public nuisance, violations of Rhode Island's Unfair Trade Practices and Consumer Protection Act, strict liability, negligence, negligent misrepresentation, fraudulent misrepresentation, civil conspiracy, unjust enrichment, and indemnity. *Id.*

18. *Id.* at 453.

19. *Id.* at 440.

nuisance claim, defendants asserted that (1) there was no interference with a public right as it has been recognized under public nuisance law and (2) they did not control the lead pigment at the time it caused harm.[20] The state responded that the public's right to be free from the hazards of unabated lead had been infringed and that defendants were responsible for the presence of lead in public and private properties throughout Rhode Island.[21] Further, the state contended that defendants could be held liable regardless of whether they controlled the properties at issue.[22] The trial justice agreed with the state and denied defendants' motion.[23]

Following a series of dismissals, only the state's public nuisance claim proceeded to trial.[24] After a seven-week trial, however, the jury deadlocked and the trial justice declared a mistrial.[25] A second jury trial then commenced against four lead pigment manufacturers, Millennium Holdings LLC (Millennium), NL Industries, Inc. (NL), The Sherwin-Williams Co. (Sherwin-Williams), and Atlantic Richfield Co. (ARCO), under the theory of public nuisance.[26]

On February 22, 2006, the jury found that "the cumulative presence of lead pigment in paints and coatings on buildings throughout the State of Rhode Island" constituted a public nuisance, and three defendants, Millennium, NL, and Sherwin-Williams, were liable for causing or substantially contributing to its creation.[27] The jury then concluded these three defendants "should be ordered to abate the public nuisance."[28] On March 16, 2007, the court entered judgment of abatement in favor of the state against defendants Millennium, NL, and Sherwin-Williams.[29] The defendants appealed the judgment.[30]

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20. *Id.*
21. *Id.* at 453.
22. *Id.* at 440.
23. *Id.*
24. *Id.* at 440-41.
25. *Id.* at 441.
26. *Id.*
27. *Id.* at 442.
28. *Id.*
29. *Id.*
30. *Id.*

ANALYSIS AND HOLDING

On appeal to the Rhode Island Supreme Court, defendants argued that the trial justice erred in refusing to dismiss the public nuisance count.[31] The Rhode Island Supreme Court agreed and held that the public nuisance claim should have been dismissed at the outset of the case because the state did not and could not allege that (1) defendants' conduct interfered with a public right or (2) defendants were in control of the lead pigment at the time it caused harm to the citizens of Rhode Island.[32]

A. Public Nuisance in Rhode Island

"Under Rhode Island law, a complaint for public nuisance minimally must allege: (1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred; and (4) causation."[33] On appeal, the central issues focused on the elements of "public right" and "control."

B. Public Right

A necessary element of public nuisance is an interference with a public right.[34] After a substantive analysis of public nuisance jurisprudence, the Court determined a "public right" to be "indivisible resources shared by the public at large, such as air, water, or public rights of way."[35] Further, the Court defined conduct that interferes with a public right to be that which "deprives all members of the community of a right to some resource to which they are otherwise entitled."[36]

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31. *Id.* at 443.
32. *Id.* at 453.
33. *Id.* at 452-53.
34. *Id.* at 452.
35. *Id.* at 453. *See* City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 131,139 (Ill. App. Ct. 2005). (Court persuaded by defendants' argument that a public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way.)
36. *Id.*; *See* Restatement (Second) of Torts § 821B cmt. g (1979) (Providing a distinction between a public right and an aggregation of private rights, the Restatement (Second) of Torts provides: "Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of

Given the Court's determination regarding that which constitutes as a "public right" and that which qualifies as interference with a public right, the Court held that the state failed to allege an interference with a public right as the term traditionally has been understood in the law of public nuisance.[37] While the state alleged that defendants infringed upon the rights of the citizens of Rhode Island to be free of the hazards of unabated lead, the Court held that this assertion fell significantly short of the requisite interference with a public right.[38] Rather, the Court held that the state must allege the defendants interfered with indivisible resources shared by the public at large, such as air, water, or public rights of way, in order to adequately assert infringement upon a public right.[39]

The Court explained that accepting the state's argument would vastly expand the definition of a public right such that it would encompass all behavior that causes widespread interference with the private rights of numerous individuals.[40] To do so, according to the Court, would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that was never intended.[41]

Accordingly, the Court held that the state failed to adequately allege that the defendants interfered with a public right.[42]

C. Control

A second necessary element of public nuisance is that a defendant must have had control over the instrumentality causing the alleged nuisance at the time the damage occurred.[43] The Court emphasized that control at the time the damage occurs is critical because the principal remedy for the harm caused by the

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land by a large number of persons.")

37. *Lead Indus. Ass'n, Inc.*, 951 A.2d at 453.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 449; *See* Friends of the Sakonnet v. Dutra, 738 F.Supp. 623, 633-34 (D.R.I. 1990). ("Importantly, the defendant must have had control over the nuisance-causing instrumentality at the time that the damage occurred.").

nuisance is abatement.[44]

Given the Court's determination that defendants' control over the instrumentality causing the alleged nuisance at the time the damage occurs is an essential element, the Court was able to determine that the state failed to adequately allege this element.[45] In its complaint, the state filed suit against defendants in their capacity "either as the manufacturer of . . . lead pigment . . . or as the successors in interest to such manufacturers," for "the cumulative presence of lead pigment in paints and coatings in or on buildings throughout the [s]tate of Rhode Island."[46] Decidedly lacking from this claim is an allegation of facts that would suggest the defendants were in control over the lead pigment at the time it harmed the citizens of Rhode Island.[47] In fact, in opposing defendants' motion to dismiss, the state maintained defendants could be held liable regardless of whether they controlled the lead-poisoned properties.[48] Ultimately, the Court held that, to state an actionable claim of public nuisance, the state would have had to assert that defendants not only manufactured the lead pigment, but also controlled the pigment at the time it caused injury to the citizens in Rhode Island.[49]

Accordingly, the Court held that the state failed to adequately allege that defendants had control over the instrumentality causing the alleged nuisance at the time the damage occurred.[50]

D. Unreasonable Conduct and Causation

Given the Court's determination that the state did not and could not allege that (1) defendants' conduct interfered with a public right or (2) defendants were in control of the lead pigment at the time it caused such harm, the Court held that it need not

44. *Id.*; *See* R.I. GEN LAWS § 10-1-1 (1999) (authorizing the Attorney General to bring an action to abate a public nuisance); State ex rel. Dresser Indus. Inc. v. Ruddy, 529 S.W.2d 789, 793 (Mo. 1980) ("Injunctions or abatements have been the traditional remedies where the state brings suit for a public nuisance . . . .").

45. *Lead Indus. Ass'n, Inc.*, 951 A.2d at 455.

46. *Id.*

47. *Id.*

48. *Id.* at 440.

49. *Id.* at 455.

50. *Id.*

decide whether defendants' conduct was unreasonable or whether defendants caused an injury to the citizens of Rhode Island.[51]

E. Remaining Remedies

Although the Court held that defendants' conduct does not constitute a public nuisance, the Court emphasized that Rhode Islanders are not left without a remedy for the problems of childhood lead poisoning throughout the state.[52] First, an injunction requiring abatement may be obtained against landlords who permit lead paint on their property to decay.[53] Second, the LPPA provides for penalties and fines against property owners who violate its obligations.[54] Finally, the LHMA permits a private cause of action to be brought by households with at-risk occupants for injunctive relief to obligate property owners to comply with the Act.[55]

Apart from these aforementioned actions, the Court emphasized that the proper means of bringing a lawsuit against a manufacturer of lead pigment for the sale of an unsafe product is a products liability action.[56] Whereas public nuisance focuses on the abatement of annoying or bothersome activities, products liability law has a well-defined structure specifically designed to hold manufacturers liable for harmful products they inject into the stream of commerce.[57] The Court stressed it was essential that these two causes of action remain separate and distinct.[58]

THE PROPRIETY OF THE STATE'S CONTINGENCY FEE ARRANGEMENT WITH PRIVATE COUNSEL

FACTS AND TRAVEL

Prior to commencing the civil action, the Attorney General of

51. *Id.*
52. *Id.* at 456.
53. *Id.*; *See, e.g.*, Pine v. Kalian, 723 A.2d 804, 804-05 (R.I. 1998).
54. *Lead Indus. Ass'n, Inc.*, 951 A.2d at 456; *See* R.I. GEN LAWS § 23-24.6-23 (2001); R.I. GEN LAWS § 23-24.6-27 (2001).
55. *Id.*; *See* R.I. GEN LAWS § 42-128.1-10 (2006).
56. *Lead Indus. Ass'n, Inc.*, 951 A.2d at 456.
57. *Id.*
58. *Id.* at 457.

Rhode Island determined his office lacked sufficient resources to undertake the demands of such a substantial case and, consequently, entered into a contingent fee agreement with two law firms.[59] The agreement provided that the law firms would provide legal representation on behalf of the state and, in return, the law firms would be entitled to 16 2/3 percent of any award recovered.[60]

During the course of the trial, defendants argued that such a contingent fee agreement was unenforceable and void because the agreement (1) constituted an unlawful delegation of the Attorney General's authority and (2) violated public policy.[61] The trial justice, disagreeing with defendants, upheld the contingent fee arrangement as a lawful contract.[62] Thereafter, defendants petitioned the Rhode Island Supreme Court for a writ of certiorari to review the propriety of such a contingent fee agreement.[63] After an oral hearing on the issue, the Court held the issue was not then properly justiciable, and thus, the Court declined to make a judgment.[64] Following the trial court's finding for the state on the public nuisance claim, defendants once again requested that the Court review the propriety of the state's contingent fee arrangement with private counsel.[65]

ANALYSIS AND HOLDING

On appeal to the Rhode Island Supreme Court, defendants contended that the trial justice erred in permitting the state to enter into a contingent fee agreement with private counsel because such an agreement constitutes an unlawful appropriation of state funds which, in turn, violates Rhode Island law.[66] Specifically, defendants argued that when the Attorney General obtains money that rightly belongs to the state, he is obligated by

59. *Id.* at 469. The firms with which the state entered into a contingent fee agreement were Ness, Motley, Loadholt, Richardson & Poole (now known as Motley Rice LLP) and Decof & Grimm (now known as Decof & Decof). *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 434-35.
66. *Id.* at 477.

statute to pay all of that money into the General Treasury.[67] Therefore, defendants contended that the contingent fee arrangement would allow the Attorney General to circumvent this statutory requirement because a percentage of money obtained would be paid to outside counsel before going to the General Treasury.[68] On this issue of first impression, the Court disagreed with defendants' argument and held that the Attorney General may enter into a contingency fee arrangement with private counsel in a civil case so long as the Attorney General retains absolute and total control over all critical decision-making.[69]

A. The Contingency Fee Issue Warranted Review

Although the Court determined that the defendants' appeal on the propriety of the state's contingency fee arrangement became moot when the Court determined the state's public nuisance claim was not a proper cause of action, the Court nevertheless held that the issue warranted consideration.[70] The Court made this determination because it found the issue to be of "extreme public importance" and is "capable of repetition yet evades review."[71] Further, the Court noted that it would be a disservice to Rhode Island judicial officers, the Attorney General, and the public at large if the Court declined to address this issue.[72]

B. The Propriety of Contingent Fee Arrangements

The Court began its analysis with an overview of the powers and responsibilities of the Attorney General in order to determine if any inherent constitutional principles or policy considerations precluded the Attorney General from entering into a contingent fee arrangement with private counsel.[73] In this analysis, the Court noted that the Attorney General is an independently elected constitutional officer entrusted with the common law duty of representing the public interest and ensuring that justice is

67. *Id.*
68. *Id.* at 478.
69. *Id.* at 475.
70. *Id.* at 470.
71. *Id.* (quoting Morris v. D'Amario, 416 A.2d 137, 139 (R.I. 1980)).
72. *Id.*
73. *See id.* at 470-74.

properly sought after in both the criminal and civil arenas.[74] To uphold this duty, the Rhode Island Constitution, several Rhode Island statutes, and the common law provide the Attorney General with a broad degree of discretion, and historically, the Court has tended, when appropriate, to provide deference to the Attorney General's strategic and tactical decisions.[75] Accordingly, the Court concluded that the Attorney General is entitled to act with a significant degree of autonomy.[76]

Given consideration of the Attorney General's powers and responsibilities, the Court determined there is nothing unconstitutional, illegal, or inappropriate in a contractual relationship in which the Attorney General hires outside counsel under a contingent fee arrangement in civil litigation.[77] Rather, the Court determined such arrangements may lead to socially beneficial results which otherwise may not have been attainable.[78]

C. Contingent Fee Arrangements Do Not Constitute Unlawful Appropriations of State Funds

Following a determination that the Attorney General's contingent fee arrangement was not precluded on policy or constitutional grounds, the Court addressed the defendants' argument that the Attorney General's contingent fee agreement constitutes an unlawful appropriation of state funds which, in turn, violates Rhode Island law.[79] The Court concluded such an arrangement does not constitute an unlawful appropriation of state funds because an attorney operating under a contingent fee arrangement with the Attorney General has an equitable lien on any recovered damages pursuant to the terms of the fee agreement.[80] Hence, the contingent fee counsel has an equitable

74. *Id.* 471-72, 474 (citing Newport Realty, Inc. v. Lynch, 878 A.2d 1021, 1032 (R.I. 2005)); *see generally* Freeport-McMoRan Oil & Gas Co. v. Fed. Energy Regulatory Comm'n, 962 F.2d 45, 47 (D.C. Cir. 1992) (stating that the solemn duty to do justice applies "with equal force to government's civil lawyers").

75. *Id.* at 473-74.

76. *Id.* at 474.

77. *Id.* at 475.

78. *Id.*

79. *Id.* at 477-78.

80. *Id.* at 478.

right to a portion of the damages.[81] Accordingly, the net amount which must be payable to the General Treasury is determined only after the appropriate fee has been paid to the contingent fee counsel in accordance with the equitable lien holding.[82]

D. Restrictions on Contingent Fee Arrangements

Although the Court determined that the Attorney General may enter into contingent fee arrangements with outside counsel in a civil case, the Court held that a number of limitations must be expressly set forth in such arrangements.[83] First, the Office of the Attorney General must have total control over the course and conduct of case.[84] Second, the Attorney General must have veto authority over any decisions made by outside counsel.[85] Third, a senior member of the Attorney General's staff must be personally involved in all stages of the case.[86] Finally, the Attorney General must appear to be exercising control of the case.[87]

Additionally, the Court held that contingent fee arrangements should be subject to judicial oversight for a determination of the reasonableness of the fee before any payment is made to counsel and before any net amount is paid to the state.[88] Only after a court has reviewed and approved the fee arrangement can the requisite fee be paid and the resulting balance turned over to the General Treasury.[89]

COMMENTARY

A. The Impropriety of the State's Public Nuisance Claim.

The Rhode Island Supreme Court's holding regarding the impropriety of the state's public nuisance claim has received a great deal of national media attention, making it arguably one of

81. *Id.*
82. *Id.*
83. *Id.* at 477.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 479.
89. *Id.* at 480.

the highest profile decisions ever to come out of the State of Rhode Island. This notoriety occurred, in large part, because the trial court's finding for the state marked the first time former lead pigment manufacturers were found liable for the creation of a public nuisance, and in the wake of this initial decision, a wave of similar public nuisance litigation commenced throughout the nation.[90] Further, much attention was paid to the trial court's decision because it was hailed as a victory for the citizens, specifically the children, of the State of Rhode Island.[91] Accordingly, when the Rhode Island Supreme Court overturned the verdict, the decision drew widespread attention and, in turn, was received by many with hostility.[92]

Despite all the sound and fury, however, a meticulous examination of the Court's decision demonstrates it is consistent with the prior application of the tort of public nuisance in Rhode Island. Specifically, the Court's determination that, to establish the requisite interference with a public right one must allege interference with "indivisible resources shared by the public at large, such as air, water, or public rights of way," is indeed in accordance with conduct Rhode Island courts have previously found to state an actionable claim for public nuisance.[93] Likewise, the Court's finding that a public nuisance defendant must control

90. *See* Corry E. Stephenson, *After Rhode Island's Public Nuisance Case, Lead Paint Industry on the Defensive*, Lawyers USA, Apr. 23, 2007, http://www.lawyersweeklyusa.com/index.cfm/archive/view/id/404488.

91. *See, e.g.*, Editorial, *Getting the Lead Out*, The Boston Globe, Apr. 10, 2006, http://www.boston.com/news/globe/editorial_opinion/editorials/articles/2006/04/10/getting_the_lead_out/ ("[I]f the verdict stands, thousands of Rhode Island children will be kept safe from this everyday poison").

92. *See, e.g.*, Fidelma Fitzpatrick, Bob McConnell, Jack McConnell, Editorial, *Fidelma Fitzpatrick/ Bob McConnell/ Jack McConnell:*, Aug, 29, 2008, http://www.projo.com/opinion/contributors/content/CT_mcconn19_08-19-08_MHB7EKI_v24.412fc2a.html.

93. *See, e.g.*, Wood v. Picillo, 443 A.2d 1244, 1245 (R.I. 1982) (Public nuisance action appropriate where defendants' chemical dump emitted odors into air which caused individuals throughout the community to suffer illness); Narragansett Real Estate Co. v. Mackenzie, 34 R.I. 103, 123 (R.I. 1912) (Court explicated that obstructions which materially impair the public's right of navigation in public waters would constitute a public nuisance); State v. Providence Gas Co., 27 R.I. 142, 143 (R.I. 1905) (Defendant's pollution of public waters that caused damage to shoreline, emitted noxious odors, and affected fish, constituted a public nuisance).

the instrumentality causing the alleged nuisance at the time the damage occurred is similarly in line with prior public nuisance claims Rhode Island courts determined to be actionable.[94] In fact, Rhode Island courts have, on occasion, emphasized the importance of the element of control in public nuisance actions.[95]

In addition to the Court's adherence to the traditional requirements of a public nuisance claim as applied in Rhode Island, the Court's decision is in harmony with the overwhelming amount of case law that suggests the tort of public nuisance is not the appropriate cause of action to pursue product-based claims.[96] Over the past three decades, the nation has witnessed a wave of public nuisance claims involving products such as asbestos, firearms, tobacco, and most recently, lead paint.[97] Despite the prevalence of these actions, however, the vast majority of courts have rejected public nuisance claims against product manufacturers.[98] While the rationale of each court's respective holdings are varied, their decisions frequently echo an underlying concern that the application of public nuisance to product manufacturers constitutes an unwarranted expansion of the tort into a realm which greatly exceeds its traditional and logical limitations.[99]

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94. *See, e.g.*, *Wood*, 443 A.2d at 1245-46 (Defendants owned the chemical dump at the time its noxious fumes caused harm to community); Pine v. Vinagro, 1996 WL 937004, at *1, 23 (Defendants owned and operated waste stock piles at the time its smoke and offensive odors caused harm to nearby residents).

95. *See, e.g.*, Friends of the Sakonnet v. Dutra, 749 F.Supp 381, 395 (D.R.I. 1990) (Applying Rhode Island law, the Court stated "liability . . . under the law of nuisance depends primarily on the question of control and duty . . . [o]ne who controls a nuisance is liable for damages caused by that nuisance.").

96. *See* Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom: The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 962 (2007).

97. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L. J. 541, 552-61 (2006).

98. *See id.*

99. *See e.g.*, Tioga Public School Dist. No. 15 of Williams County, State of N.D. v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993) ("Nuisance law would become a monster that would devour in one gulp the entire law of tort); In re Lead Paint Litigation, 924 A.2d 484, 494 (N.J. 2007) (" [W]ere we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely

Ultimately, a review of Rhode Island judicial precedent, as well as the vast majority of case law involving product-based public nuisance claims, reveals that the Court properly concluded a public nuisance action could not be asserted against defendants in this instance. This decision, as disconcerting as it may seem to the untrained eye, clearly reflects adherence to the theoretical underpinnings of the tort of public nuisance and its respective application in Rhode Island. While overturning the trial court's decision undoubtedly brought the Court no pleasure, the Court is nevertheless constrained by the law and "powerless to fashion independently a cause of action that would achieve the justice that these children deserve."[100]

Looking ahead, this decision will undoubtedly have a significant impact on the future application of the tort of public nuisance in Rhode Island. The Court's decision served to add a great deal of clarity to a tort William Prosser and Werdner Page Keeton famously labeled an "impenetrable jungle."[101] Most importantly, however, this decision illuminates the impropriety of a public nuisance action for a product-based claim, which, according to the Court, is appropriately reserved for products liability actions.[102] While the wave of product-based public nuisance actions may, for a time, continue throughout the nation, this decision makes clear such claims have no legal foundation in Rhode Island.

B. Contingency Fee Arrangement

Although the Court's decision regarding the propriety of the state's contingency arrangement has not received the same degree of national attention as its decision regarding the impropriety of the state's public nuisance claim, it nevertheless is a monumental holding that will undoubtedly have a lasting impact in Rhode Island. Going forward, the Attorney General may enter into a contingency fee arrangement with outside counsel in order to

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unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance").

100. State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 436 (R.I. 2008).

101. *See id.* at 455 n.17 (citing W. Page Keeton et. al., *Handbook of the Law of Torts*, ch. 15, § 86 at 616 (5th ed. 1984)).

102. *See id.* at 456.

assist in laborious civil litigation.[103]

Overall, this decision rests on the Court's determination that the Attorney General is dutifully bound to ensure "that justice shall be done" and accordingly, as an independently elected constitutional officer, is vested with broad discretionary authority to determine how to pursue such objectives.[104] The Court arrived at this determination upon a meticulous and substantive review of the responsibilities and respective powers of the Attorney General. Further, the Court's decision rests soundly on the historical trend in Rhode Island to provide, when appropriate, deference to the strategic and tactical decisions of the Attorney General.[105]

While this decision is demonstrative of the Court's great respect for the discretionary authority vested in the Attorney General, it nevertheless does not provide the Attorney General carte blanche to enter such agreements without restriction. Rather, the Court makes clear that such agreements are permissible only in civil cases and must contain inherent limitations.[106] At the forefront of such limitations, the Attorney General must retain absolute and total control over all critical decisions throughout the entirety of the case.[107] Given this requirement, the Court effectively ensures that the interests of the citizens of Rhode Island are, at all times, superior to any interests of outside counsel. Additionally, the Court emphasized that the trial judge must review the reasonableness of such fee arrangements before any awards can be apportioned.[108] With this check in place, the Court makes certain that the state of Rhode Island recovers a fair and equitable portion of any award obtained.

Ultimately, the Court's holding represents an appropriate balance, providing the Attorney General discretion to uphold his duty-bound obligations by entering into contingency fee arrangements with private counsel yet ensuring that the interests of the citizens of Rhode Island are properly represented.

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103. *Id.* at 475.
104. *See id.* at 473-74.
105. *See id.* at 474.
106. *Id.* at 475.
107. *Id.* at 477.
108. *Id.* at 479.

CONLUSION

The Rhode Island Supreme Court held that the state failed to assert a cognizable public nuisance claim because it did not and could not allege two requisite elements of the tort: (1) that defendants interfered with a right common to the general public and (2) that defendants were in control of the product that caused the alleged nuisance at the time it harmed the citizens of Rhode Island.[109] Accordingly, the Court concluded that the trial justice erred in denying defendants' motion to dismiss.[110]Additionally, addressing an issue of first impression, the Court determined that the Attorney General may enter into a contingency fee arrangement with outside counsel in a civil case, so long as the Attorney General retains absolute and total control over all critical decision-making.[111] The Court emphasized that such arrangements may assist the Attorney General in pursuit of dutifully bound obligations, and, in turn, lead to socially beneficial results which otherwise may not have been attainable.[112]

Matthew Watson

109. *Id.* at 453.
110. *Id.* at 458.
111. *Id.* at 475.
112. *Id.*

Tort Law. *Tyre v. Swain*, 946 A.2d 1189 (R.I. 2008). The superior court has jurisdiction to declare a defendant a slayer under Slayer's Act. Once the superior court has determined whether or not the defendant is a slayer, the probate court will then determine what effect that determination has on the distribution of the decedent's assets. In addition, an aggrieved party who does not raise an objection at trial on a particular issue has waived his right to address that issue on appeal.

FACTS AND TRAVEL

Shelley Tyre (hereinafter Shelley) died March 12, 1999, while scuba diving near Tortola, British Virgin Islands.[1] Upon returning to the U.S. over a week later Shelley's husband (hereinafter defendant) informed Shelley's parents that he did not know what had happened to Shelley, and that he was not diving with her when she drowned.[2] Subsequently, on March 5, 2002, Shelley's parents filed a three-count complaint against the defendant, which alleged that defendant: (1) was a slayer, pursuant to section 33-1.1-1(3) of the Rhode Island General Laws[3] (RIGL); (2) caused Shelley's wrongful death[4]; and (3) should be subject to civil liability for a criminal act, pursuant to RIGL section 9-1-2.[5]

Over the course of the next four years, there were numerous hearings on pretrial motions to address the status of defendant's counsel.[6] Defendant's initial counsel was an attorney who handled primarily probate matters.[7] After realizing that this case was beyond her expertise, however, the probate attorney helped the defendant retain a trial attorney.[8] Unfortunately, the trial

1. Tyre v. Swain, 946 A.2d 1189, 1192 (R.I. 1999).
2. *Id.*
3. R.I. GEN. LAWS § 33-1.1-1(3) (1995).
4. *Tyre*, 946 A.2d at 1192.
5. *See id.*; R.I. GEN. LAWS § 9-1-2 (1997).
6. *Tyre*, 946 A.2d at 1192.
7. *See id.*
8. *See id.*

attorney subsequently became seriously ill and was excused from the case by the court.[9] In June 2004, the probate attorney moved to withdraw from representing the defendant in the wrongful death action due to her inexperience with trial work.[10] The trial judge denied that motion on the basis that allowing the probate attorney to withdraw while the trial attorney was court-excused could result in the trial being stayed indefinitely.[11] During this proceeding the trial judge suggested that the defendant seek alternate counsel.[12]

In August 2005, the plaintiffs moved to assign the case for a trial date certain,[13] arguing that pursuant to RIGL sections 9-2-18[14] and 9-2-20,[15] they had a right to accelerate the case. At a hearing on the issue, the trial judge balanced the defendant's desire to have his trial attorney's representation with the plaintiffs' interest in accelerating the case.[16] Citing her concern that any further continuance would infringe on the plaintiffs' rights, the judge set a trial date of October 25, 2005.[17] Before this hearing concluded, the judge again advised the defendant to seek alternate trial counsel.[18]

In October 2005, because the defendant's trial attorney was too ill to represent him, the defendant moved to stay the start of the trial.[19] There were two other trial attorneys who were willing to represent the defendant, but both needed additional time to prepare for trial.[20] The trial judge denied the defendant's motion to stay the trial on the basis that defendant should have retained

9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *Id.*
14. *See id.* at 1193; R.I. GEN. LAWS § 9-2-18 (1997) (requiring the acceleration of causes of action brought by plaintiffs sixty-five years of age or older at the request of the party).
15. R.I. GEN. LAWS § 9-2-20 (1997) (requiring the acceleration of actions for wrongful death and other actions involving damages in excess of $100,000).
16. *Tyre*, 946 A.2d at 1192-93.
17. *Id.* at 1193.
18. *Id.*
19. *See id.*
20. *Id.*

alternate counsel sooner.[21]

Defendant then petitioned the Rhode Island Supreme Court for a writ of certiorari to review the denial of his motion to stay the proceedings, but immediately thereafter filed for bankruptcy which automatically stayed all of the proceedings in the case.[22] The Supreme Court therefore dismissed the writ as moot.[23] In December 2005, the bankruptcy stay was lifted.[24] The trial court held a scheduling conference at which the plaintiffs requested a trial date and defendant's two attorneys moved to withdraw from the case.[25] The trial judge granted both motions for withdrawal, and after the defendant informed her that he had no intention of presenting a defense at trial, the judge set a trial date of February 13, 2006.[26]

Throughout the trial, the defendant's participation was limited:[27] he was in court few trial days and did not cross-examine any witnesses.[28] The defendant did, however, move for dismissal of count one of the complaint on the basis that Slayer's Act[29] did not give rise to an independent cause of action.[30] The trial judge agreed that §33-1.1-1(3) did not give rise to an independent cause of action, but stated that a jury had to determine whether the plaintiffs had proven that the defendant intentionally killed Shelley with malice aforethought, so that the trial judge herself could then declare whether the defendant was a slayer within the meaning of the statute.[31]

The jury found in favor of the plaintiffs on all three counts, and awarded compensatory damages with interest totaling $2,815,085.46, and punitive damages of $2,000,000.[32] The defendant's motion for a new trial was denied, and he timely appealed to the Supreme Court.[33]

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *See id.*
27. *Id.* at 1196.
28. *Id.*
29. *Id.;* R.I. GEN. LAWS § 33-1.1-1(3) (1995).
30. *Tyre,* 946 A.2d at 1196.
31. *Id.*
32. *Id.*
33. *Id.*

ANALYSIS AND HOLDING

Subject Matter Jurisdiction

The Rhode Island Supreme Court first considered defendant's argument that the superior court lacked subject matter jurisdiction to declare him a slayer under Slayer's Act[34] because the probate court has exclusive jurisdiction to determine whether a person is a slayer.[35] Plaintiffs countered that the superior court had jurisdiction pursuant to the Uniform Declaratory Judgments Act (the UDJA).[36]

Rhode Island law vests probate courts with jurisdiction over the probate of wills.[37] The superior court, however, "may exercise general probate jurisdiction in all cases brought before it on appeal from probate courts, or when such jurisdiction is properly involved in suits in equity."[38] In addition, the UDJA expressly provides that the superior court also has jurisdiction to make declarations in probate matters.[39]

The Supreme Court emphasized that because Rhode Island's Slayer's Act may apply in the absence of a criminal conviction, a civil proceeding was required in this case to determine whether the defendant willfully or unlawfully took Shelley's life.[40] The Court determined that because defendant was entitled to a jury determination of his status as a slayer, which the probate court could not provide, the superior court had subject matter jurisdiction with regard to whether the defendant was a slayer; it was then up to the probate court to determine what effect that

34. *Id.* at 1197.

35. *Id.*

36. *Id.*; R.I. GEN. LAWS § 9-30-1 (1997) (vesting the superior court with the power to "declare rights, status and other legal relations, whether or not further relief is or could be claimed.")

37. *Tyre,* 946 A.2d at 1197; R.I. GEN. LAWS § 8-9-9 (1997) (stating, in relevant part: "[e]very probate court shall have jurisdiction . . . of the probate of wills . . . .").

38. *Tyre,* 946 A.2d at 1197; R.I. GEN. LAWS § 8-2-17 (1997).

39. *Tyre,* 946 A.2d at 1197; R.I. GEN. LAWS § 9-30-4 (1997) (stating, in relevant part: "[a]ny person interested as through an executor, . . . next of kin . . . in the estate of a decedent . . . may have a declaration of rights or legal relations in respect thereto: . . . to determine any question arising in the administration of the estate . . . .").

40. *Tyre,* 946 A.2d at 1198.

declaration had on the distribution of Shelley's assets.[41]

Motion for Continuance

The Supreme Court affirmed the denial of the defendant's motion for a continuance because, prior to trial, the defendant failed to request a continuance of the February 2006 trial date, and therefore had not properly preserved this issue for appeal.[42] The Court cited the well-recognized rule that it will not "review issues that are raised for the first time on appeal."[43]

Moreover, the Court noted that even if the defendant had properly preserved this issue for appeal, because a trial judge has great discretion in managing her trial calendar, the Court would not disturb a trial justice's decision to grant or deny a continuance absent an abuse of discretion.[44] Because the trial judge advised the defendant to seek alternate counsel several times, and properly balanced the plaintiffs' interest in an accelerated trial,[45] the Supreme Court held that the trial judge had not abused her discretion.[46]

Punitive Damages

The Supreme Court next addressed the defendant's argument that the trial judge erred in permitting punitive damages in a wrongful death action brought under RIGL section 9-1-2.[47] The defendant's first objection to the jury award of punitive damages was in his motion for a new trial; he did not object to the trial judge's jury instructions on punitive damages, nor did he object during a later hearing on the motion for a new trial.[48] The Court held that because the defendant did not make a timely objection to

41. *Id.*
42. *Id.* at 1198-99.
43. *Id.* at 1199.
44. *Id.*
45. *Id.*; R.I. GEN. LAWS § 9-2-18 (1997) (requiring the acceleration of causes of action brought by plaintiffs sixty-five years of age or older at the request of the party), and § 9-2-20 (requiring the acceleration of actions for wrongful death and other actions involving damages in excess of $100,000).
46. *Tyre*, 946 A.2d at 1199.
47. *Id.*; R.I. GEN. LAWS § 9-1-2 (1997).
48. *Tyre*, 946 A.2d at 1200.

punitive damages at trial, he had waived the issue on appeal.[49]

Single Judgment

The defendant's fourth argument on appeal was that the jury should have rendered separate verdicts for economic loss damages and survival damages and that therefore, the trial court's single judgment for plaintiffs' wrongful death claim was in error.[50] Defendant argued that combining the compensatory damages award for plaintiffs' wrongful death and survival claims prevented survival damages from passing to his children, who were named as contingent beneficiaries in Shelley's will.[51]

The Rhode Island Wrongful Death Act[52] provides two separate causes of action: section 10-7-1 provides for recovery for the death itself, and sections 10-7-5 and 10-7-7 provide for survival damages. The Court noted that the Act also mandates that damages for the wrongful death itself shall be awarded to the decedent's next of kin and not to the estate,[53] while survival damages shall be awarded to the estate itself.[54]

In reviewing the trial court's record, the Supreme Court noted that although the trial judge failed to instruct the jury to render separate verdicts for wrongful death and survival damages, the defendant did not object at the time, and first raised this issue in his motion for a new trial.[55] Citing Rule 51(b) of the Superior

49. *Id.*
50. *Id.*
51. *Id.*
52. R.I. GEN. LAWS §10-7 (1997).
53. *Tyre*, 946 A.2d at 1200; R.I. GEN. LAWS § 10-7-10 (1997) (stating: "[a]ll damages recoverable under §§ 10-7-1 – 10-7-4 shall be recoverable by and awarded to those beneficiaries as specified in § 10-7-2 and shall not be deemed or considered damages to the estate of the decedent, nor shall they be considered in any way an asset of the estate of the decedent, nor liable to any claims against the estate of the decedent."); R.I. GEN. LAWS § 10-7-2 (1997) (providing, in relevant part: "of the amount recovered in every action under this chapter one-half shall go to the husband or widow, and one-half shall go to the children of the deceased, . . . and, if there is no husband or widow, to the next of kin . . . .").
54. *Tyre*, 946 A.2d at 1200; R.I. GEN. LAWS § 10-7-6 (1997) (providing, in relevant part: "the amount recovered in every action under § 10-7-5 shall go to the decedent's estate and become part of the estate.").
55. *Tyre*, 946 A.2d at 1201.

Court Rules of Civil Procedure,[56] which states in relevant part, that "[n]o party may assign as error the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict," the Supreme Court refused to interfere with the compensatory damages judgment entered in favor of the plaintiffs.[57]

Conformed Verdict

Defendant's final argument on appeal was that the trial justice erred by *sua sponte* applying the compensatory damages award to the plaintiffs' section 9-1-2 claim,[58] because the plaintiffs' complaint did not seek compensatory damages on that claim.[59] The Court held that because the defendant failed to object to the application of compensatory damages to the section 9-1-2 count at trial, he could not raise the argument on appeal.[60]

COMMENTARY

The *Tyre* Court correctly held that the superior court has jurisdiction to declare a defendant a slayer under Rhode Island's Slayer's Act.[61] The plaintiffs in this case were obviously seeking a declaration that the defendant was a slayer so that he would not qualify as a beneficiary of their daughter's estate.[62] Because Rhode Island's Slayer's Act does not require a criminal conviction for a defendant to be declared a slayer, a civil proceeding may be necessary to determine whether a defendant willfully took the victim's life. Section 9-30-4 of the UDJA clearly vests the superior court with jurisdiction to make declaratory judgments with respect to probate matters.[63] Thus, the Rhode Island Supreme

56. *See id.*; SUPER. CT. R. CIV. P. 51(b).
57. *Tyre*, 946 A.2d at 1201-02.
58. *See id.*; R.I. GEN. LAWS § 9-1-2 (1997).
59. *Tyre*, 946 A.2d at 1202.
60. *Id.*
61. R.I. GEN. LAWS § 33-1.1-1(3) (1995).
62. *Tyre*, 946 A.2d at 1198.
63. R.I. GEN. LAWS § 9-30-4 (1997) (stating, in relevant part: "[a]ny person interested as through an executor, . . . [or] next of kin . . . in the estate of a decedent . . . may have a declaration of rights or legal relations in respect thereto: . . . to determine any question arising in the administration of the estate . . . .").

Court properly held that in the absence of a criminal conviction, the superior court had jurisdiction to declare the defendant in this case a slayer, so that he would not be a beneficiary of his deceased wife's estate.

Above all, however, the Rhode Island Supreme Court's decision in this case illustrates the importance of making timely and appropriate objections during lower court proceedings. A party who neglects to raise an objection at trial waives his right to address that issue on appeal. Future litigants who elect to proceed *pro se,* as the defendant in this case, must be cognizant of this fact and adhere to the rules of civil procedure at trial or risk losing their right to raise issues on appeal.

CONCLUSION

In *Tyre v. Swain,* the Rhode Island Supreme Court held that the superior court has jurisdiction to declare a defendant a slayer under Slayer's Act,[64] and that once the superior court has determined whether or not defendant is a slayer, the probate court will then determine what effect that determination has on the distribution of the decedent's assets.[65] In addition, the Court affirmed that an aggrieved party who does not raise an objection at trial on a particular issue has waived his right to address that issue on appeal.[66]

Julie K. Moore

64. *Id.* at 1198; R.I. GEN. LAWS § 33-1.1-1(3) (1995).
65. *Id.*
66. *Id.* at 1199-1202.

Torts. *Willis v. Omar*, 954 A.2d 126 (R.I. 2008). A social host is not under a duty of care to protect third parties from an intoxicated driver leaving the host's home, where the driver was an invited guest who consumed alcohol served by the host. The Supreme Court of Rhode Island was asked to create a new cause of action that imposes a duty of care on a "social host to protect a person from injury resulting from alcohol consumption by either a guest or a drunk driver who leaves the party and is involved in an accident that causes injury or death."[1] The Court declined to overturn established precedent, and reiterated its stance that creation of a cause of action based on social host liability is best suited for the Rhode Island Legislature.

FACTS AND TRAVEL

On August 30, 2002, after a long night of drinking, the intoxicated plaintiff, Elizabeth Willis, suffered permanent injuries from a single-car collision in a vehicle operated by her similarly intoxicated boyfriend, Steven N. Grise (Grise).[2] The night began around 5:30 p.m., when the plaintiff went to Grise's apartment[3], where the two ate dinner and each consumed a kamikaze cocktail.[4] Afterward, the plaintiff and Grise went to meet Maurice and Barbara Omar, the defendants, at a pizza restaurant in Smithfield, Rhode Island.[5] While at the restaurant, both Grise and the plaintiff consumed two margaritas with their pizza before departing to the defendants' home.[6]

Upon arriving at the defendants' residence around 8:00 p.m., Maurice Omar concocted two pitchers of Long Island Iced Tea.[7] The defendants poured drinks for the plaintiff and Grise

1. Willis v. Omar, 954 A.2d 126, 129 (R.I. 2008).
2. *See id.* at 127.
3. *Id.* (Grise's apartment is located in Manville, Rhode Island.)
4. *Id.* A kamikaze is an alcoholic beverage that consists of triple sec, vodka, and limejuice.
5. *Id.* at 128.
6. *Id.*
7. *Id.* A Long Island Iced Tea is an alcoholic beverage consisting of vodka, tequila, rum, gin, and Crème de Menthe.

continuously for over three hours, during which time the plaintiff claimed Maurice encouraged her to keep drinking.[8] The actual amount of alcohol consumed by Grise at the defendants' home was in dispute.[9]

After leaving the defendants' home, the couple drove less than a mile to the plaintiff's aunt's house to pick up the plaintiff's niece.[10] However, the plaintiff's aunt would not allow her daughter to leave with the visibly intoxicated plaintiff.[11] Shortly thereafter, Grise crashed his truck into a utility pole and surrounding rock.[12] Grise was subsequently observed stumbling around his vehicle, and police noted a strong odor of alcohol on his breath.[13] Upon arrival at Rhode Island Hospital, plaintiff had a blood alcohol level of 0.261, and Grise's was 0.196.[14] As a result of the accident the plaintiff suffered serious injuries, resulting in the amputation of her left leg.[15]

Grise was charged with two felonies; operating a vehicle under the influence of alcohol, res injury, and driving to endanger, resulting in serious bodily injury.[16] Grise entered into a plea agreement on both counts and is serving a ten-year sentence at the Adult Correctional Institution.[17]

On October 27, 2003, Elizabeth Willis filed suit against the defendants alleging negligence and civil liability for crimes and offenses.[18] The trial court granted summary judgment in favor of the defendants reasoning that; "Rhode Island has not embraced social-host liability for drunk-driving casualties, in the absence of

8. *Id.* Plaintiff contends that Maurice pressured her with statements like: "You're Irish. You can do better that." *Id.*

9. *Id.* The plaintiff first informed police that she and Grise "had a couple drinks," but later recalled having eight drinks and being "blurry-eyed" and that Grise was staggering as he walked out of the defendants' residence to his car. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* The crash occurred on Old River Road in Lincoln, Rhode Island.

13. *Id.*

14. *Id.* (Thirty-five minutes after his initial test another blood sample was taken from Grise that resulted in a 0.185 blood alcohol level).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

a special relationship."[19] Plaintiff filed a timely appeal of the summary judgment motion.[20] The issue on appeal became whether a special relationship existed giving rise to a duty of care on the part of the defendant social hosts who provided alcoholic beverages to the plaintiff and her boyfriend, making them liable for the plaintiff's injuries.

BACKGROUND

To maintain a negligence cause of action "a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and resulting injury, and the actual loss or damage."[21] The existence of such a legal duty is a question of law, and if no duty is found to exist the plaintiff's claim must fail as a matter of law.[22]

Rhode Island courts have consistently "refused to adopt the principle that a social host owes a duty to a third party for injuries suffered by an intoxicated guest who was imbibing at his or her home, and [] have only imposed such a duty where a special relationship exists."[23] While the Court has recognized social host liability in the past, it has been limited to circumstances when alcohol was illegally provided to a minor and that minor suffered an injury.[24] However, illegally furnishing minors with alcohol alone is insufficient to impose a duty of care if the resultant risk of injury is not foreseeable.[25] Further, the Rhode Island Supreme Court has made clear that, while supplying alcohol to minors may

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19. *Id.* at 129

20. *Id.*

21. *Id.* (citing Mills v. State Sales Inc., 824 A.2d 461, 467 (R.I. 2003) (quoting Jenard v. Halpin, 567 A.2d 368, 370 (R.I. 1989)).

22. *Id.* at 129-30. When determining whether a legal duty exists, the Court will look to "the relationship between the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy considerations, and notions of fairness." *Id.*

23. *Id.* at 130 (citing Ferreira v. Strack, 652 A.2d 965, 968 (R.I. 1995); *see* Marty v. Garcia, 667 A.2d 282, 283 (R.I. 1995)).

24. *Id.*; *see* Martin v. Marciano, 871 A.2d 911, 915-16 (R.I. 2005) (Based on public policy and foreseeability, the Court held that a party host who makes alcohol illegally available to an underage guest owes a duty of reasonable care to protect the guest from harm, including criminal assault).

25. Willis v. Omar, 954 A.2d 126, 130 (citing Selwyn v. Ward, 879 A.2d 882, 888-89 (R.I. 2005) (minor used alcohol as fuel for a fire)).

trigger a special relationship sufficient to impose a duty of care on a social host, serving alcohol to an adult does not.[26]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court affirmed the trial court's grant of summary judgment in favor of the defendants, holding that the plaintiff failed to present facts sufficient to trigger a duty of care on behalf of the defendants.[27] The Court found that the case was similar to *Ferreira v. Strack*, "a negligence action seeking damages for injuries suffered when an intoxicated party guest hit the plaintiffs."[28] In *Ferreira*, the Court found no special relationship existed giving rise to a duty of care to the defendants and thus they were not liable for the negligence of their uninvited adult guest who brought his own alcohol to their house.[29] Similarly here, although Grise and the plaintiff were invited guests who consumed alcohol served by the defendants, the Court found no "special duty-triggering relationship between the host and his. . .guests."[30] The Court did not wish to overturn established precedent and create a new cause of action.[31]

Additionally, the Court also held that G.L. 1956 chapter 14 of title 3, or the "Rhode Island Liquor Liability Act," does not impose liability on private social hosts who serve alcohol in private settings.[32] The Court reasoned that the statutory language applies only to licensed liquor retailers and those required by law to have a retail license.[33] The language clearly did not apply to the defendants in this case, and the Court would not "inject a judicial remedy. . . into a statute that plainly does not contain a remedy."[34]

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26. *See id.*
27. *Id.* at 130.
28. *See id.* at 131; Ferreira v. Strack, 652 A.2d 965, 967 (R.I. 1995).
29. *Willis*, 954 A.2d at 131 (citing *Ferreira*, 652 A.2d at 967).
30. *Id.*
31. *Id.*
32. *Id.* at 132 (R.I. Gen. Laws section 3-14-6 imposes liability on a licensed alcohol retailers and those required by law to have an alcoholic beverage retail license who negligently serve alcohol to an intoxicated individual for damages proximately caused by the individual's consumption of alcohol).
33. *Id.*
34. *Id.* (quoting Bandoni v. State, 715 A.2d 580, 585 (R.I. 1998).

COMMENTARY

This well publicized case is significant because Elizabeth Willis gave the Court the opportunity to reconsider well-established precedent regarding social host liability in Rhode Island. Understanding that the Court has never before held a social host liable for the negligent acts of an adult guest, the plaintiff asked the Court to recognize the public policy concerns and overturn precedent so that adult victims could acquire a remedy against social hosts. The court proceeded with the issue cautiously, noting that it was sympathetic towards Elizabeth Willis' injuries and the public policy issues surrounding drunk driving and its consequences. However, in a unanimous decision, the Court declined to overturn precedent, and made clear that any changes in social host liability needs to be undertaken by the state legislature.

CONCLUSION

A social host is not under a duty of care to protect third parties from an intoxicated driver leaving the host's home, where the driver was an invited adult guest who consumed alcohol served by the social host. The Court was explicit in refusing to overturn established precedent and stressed its position that "[t]he issue of liability *vel non* for social hosts whose guests cause harm is a matter that belongs in the Legislature."[35]

Matthew Schechtman

35. *Id.* at 132.

Wills & Trusts. *Estate of Giuliano v. Giuliano,* 949 A.2d 386 (R.I. 2008). Under Rhode Island General Laws, a will must meet the statutory requirements to be admitted into probate. If an interested party contests the validity of the will, a self-executing affidavit is not sufficiently determinative of the execution to admit the will to probate. Therefore, even with the existence of a self-executing affidavit, when an interested person contests the validity of the will, summary judgment is not proper because a genuine issue of material fact exists as to whether the statutory requirements have been met.

FACTS AND TRAVEL

Louis J. Giuliano, Sr., the father of the defendant, died on February 8, 2006. [1] Subsequently, Patricia Lett, the named executrix of the will, filed a petition to probate the will of Mr. Giuliano with the Probate Court.[2] The will specified the residue of decedent's estate would be distributed to a trust that the decedent and Ms. Lett had established before the decedent created the will.[3] Decedent's son, the defendant in this case, objected to probate of the will because he alleged the testator's signature on the will was not his father's.[4]

A hearing was held before the Probate Court on April 27, 2006.[5] The attorney who drafted the will testified he recalled the decedent's execution of the will.[6] An affidavit was also produced, which was notarized by the drafting attorney and signed by two other attorneys, declaring "(1) that the signers had, in the presence of each other, witnessed the execution of the will by the decedent and (2) that the decedent appeared to be of sound mind."[7]

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1. Estate of Louis J. Guiliano, Sr., et al. v. Louis J. Giuliano, Jr., 949 A.2d 386, 387 (R.I. 2008).
2. *Id.*
3. *Id.*
4. *Id.* at 387-388.
5. *Id.*
6. *Id.* at 388.
7. *Id.*

However, at the hearing one of the signing attorneys testified that he could not recall if the other signing attorney was present when he witnessed the will's signing.[8] Additionally, the other signing attorney testified that he did not remember the events that occurred during the execution of the will.[9] The second signing attorney did testify that he believed that the statutory requirements were met as that was the "normal course of action" that his firm would have followed.[10]

At the hearing, the decedent's former wife, his daughter, and his son all identified documents on which the decedent's signature appeared.[11] A handwriting expert, Curtis Baggett, compared those documents with the signature on the will, and concluded that the signature on the will was not the decedents.[12] Included in this testimony was an explanation of his methodology in examining the signatures.[13] Alternatively, the plaintiffs introduced the testimony of a handwriting expert who determined that the signature was authentic.[14]

The Probate Court judge concluded that neither parties' expert was "particularly persuasive," but that the testimony of the three attorneys established that the signature was "more probably than not" the signature of the decedent.[15] However, the judge denied the plaintiffs' petition for probate of the will because the plaintiff could not demonstrate the statutory requirements had been met.[16]

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8. *Id.*
9. *Id.*
10. *Id.* The second signing attorney testified that he believed the decedent had signed the will in his presence as well as in the presence of the first signer, and that they had signed in the presence of each other, as that was the "normal course of action" that his law firm would have followed when a will was executed.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* n. 3.
15. *Id.*
16. *Id.* at 389. *See* R.I. GEN LAWS § 33-5-5 ("No will shall be valid * * * unless it shall be in writing and signed by the testator, or by some other person for him or her in his or her presence and by his or her express direction; and this signature shall be made or acknowledged by the testator in the presence of two (2) or more witnesses present at the same time, and the witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary, and no other publication shall be ne-

On August 31, 2006, plaintiffs filed a complaint in Superior Court arguing that the Probate Court judge had erroneously concluded that the will was not properly executed, seeking an order to the Probate Court to admit the will to probate.[17] Thereafter, the plaintiffs filed a motion for summary judgment, asserting that the statutory requirements for executing the will had been met by the self-executing affidavit which stated that the witnesses to the will signed in the presence of the decedent and each other, and that the decedent signed in the witnesses' presence.[18] The defendant objected, arguing that genuine issues of material fact existed with respect to the proper execution *vel non* of the will.[19] Defendant argued that both the affidavit from the defendant's handwriting expert, and the fact that the witnesses were unable to state whether they had witnessed the decedent's signature in each other's presence, supported his contention.[20]

The Superior Court granted the motion for summary judgment and on January 4, 2007 sustained plaintiffs' probate appeal, ordering the will be admitted to probate.[21] The hearing justice stated "the legislature enacted the whole process of self-executing affidavits to create some sort of presumptive effect" and she did not think that the handwriting expert's affidavit was enough to overcome the presumptive effect of the self-executing affidavit.[22] The justice concluded that the handwriting expert's affidavit was so cursory that she could not, with confidence, say she was able to find a genuine issue of material fact.[23] On January 16, 2007, the defendant filed a notice of appeal to the Supreme Court of Rhode

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cessary.")

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 390.
22. *Id.*
23. *Id.* at 389-390. Reading the affidavit, the hearing justice stated:

> "All he says is, 'I base my opinion on my analysis of the signatures on the known and question[ed] documents and my use of accepted forensic document examination tools, principles and techniques.";

After having quoted these words from the experts' affidavit, the hearing justice sardonically commented: "Well, that's helpful. How can I say, Oh, wow, this dispute is genuine?"

Island. [24]

HOLDING AND ANALYSIS

Under Rule 56 of Rhode Island's Superior Court Rules of Civil Procedure, the moving party, in a summary judgment motion, must establish there is no genuine dispute with respect to the material facts of the case.[25] If this burden is met, the nonmovant must, by competent evidence, prove the existence of a disputed issue of material fact.[26] In determining a motion for summary judgment, a court must review the evidence from a perspective most favorable to the party opposing the motion.[27]

On appeal to the Supreme Court of Rhode Island, the defendant contended that the Superior Court justice should not have granted the motion for summary judgment because "the self-executing affidavit [was] not sufficient to establish that all of the requirements for probating the will were satisfied."[28] The defendant also contended a genuine issue of material fact existed with respect to the authenticity of the decedent's signature on the will.[29] The plaintiffs argued that the Superior Court justice appropriately granted their motion because the handwriting expert's testimony failed to set forth sufficient facts in support of his opinion that the decedent did not sign the will.[30] The plaintiff also argued the defendant was improperly relying upon the proceedings before the Probate Court to create a genuine issue of material fact.[31]

Under Rhode Island General Laws, a will must meet specific requirements to be admitted into probate.[32] These rules provide that "a valid will in Rhode Island must be signed by the testator in the presence of two witnesses; those witnesses must sign the will in the presence of each other."[33] Further, a self-executing affidavit may be used to prove the validity of a will if, but only if, there

24. *Id.*
25. *Id.* at 391.
26. *Id.*
27. *Id.* (citing Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981)).
28. *Id.* at 390.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 392 (citing R.I. GEN LAWS § 33-5-2 (2008)).
33. *Id.* (citing R.I. GEN LAWS § 33-5-5 (2008)).

is absence of objection by anyone interested in the estate.[34]

In the present case, the defendant, an interested person in the estate, did object to the purported will. The Supreme Court of Rhode Island found that because the statutory language specifically stated that a self-executing affidavit is insufficient in the presence of an objection by an interested person, the self-executing affidavit in this case did not create the presumptive effect that the Superior Court justice found.[35] Additionally, because the testimony of the signing attorneys raised questions as to their presence during the will's execution, the Court concluded that a genuine issue of material fact existed with respect to whether or not the will was properly executed.[36]

The defendant contended an additional issue of material fact existed as to the authenticity of the testator's signature.[37] The Supreme Court of Rhode Island held that although the defendant's handwriting expert's affidavit was "less than replete with information" regarding how he made his determination, "it was at least minimally adequate to satisfy the obligation of defendant to show the presence of a genuine issue of material fact."[38] The Court held that the granting of summary judgment was erroneous because of the existence of two genuine issues of material fact. [39] Therefore, the Supreme Court of Rhode Island reversed the Superior Court's grant of summary judgment. [40]

COMMENTARY

Summary judgment is proper if there is no disputed genuine issue of material fact. Here, the nonmovant, pointed to "(1) whether or not the will was executed in accordance with the statutory requirements; and (2) whether or not the signature on the will [was] genuine."[41] Although the Probate Court and the Superior Court came to opposite conclusions, neither justice addressed the issue that a self-executing affidavit may be used to prove the

34. *Id.* at 392-393 (citing R.I. GEN LAWS § 33-7-26 (2008)).
35. *Id.* at 393.
36. *Id.*
37. *Id.*
38. *Id.* at 394.
39. *Id.*
40. *Id.*
41. *Id.*

validity of a will, if, but only if, there is the absence of objection by someone interested in the estate. [42]

The Probate Court judge instead focused upon the three signing attorneys' inability to testify that they did in fact sign in the presence of one another and that the decedent signed in front of them.[43] Although the inadequacy of the self-executing affidavit is not spelled out, it appears that the Probate Judge was correct in his analysis of the statutory requirements for the probate of the will. However, it seems unrealistic to expect an attorney to remember every will they ever witnessed, especially when they must swear to it under oath.[44] It appears that the Probate judge may have recognized this when he noted that the signature "more likely than not" was that of the decedent's because of the attorney's testimony.[45] However, due to the strict nature of intestate succession law, the judge disregarded this reality, finding that the statutory language was not met.[46]

The Superior Court justice stated that a self-executing affidavit created a "presumptive effect" of a will's validity and the justice held that she did not "believe that the handwriting expert's affidavit overcame [that] 'presumptive effect'."[47] However, a court

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42. *Id.* at 392-393 (citing R.I. GEN LAWS § 33-7-26 (2008)).

43. *Id.* at 389.

44. *Id.* at 388. The second signing attorney testified that he did not have a specific recollection of the events that occurred during the execution of the will because so many years had passed. The second signing attorney did identify the witness signature as his own. Offering the Probate Court an interpretation based on the "normal course of action" that his law firm would have followed when a will was executed there, the second signing attorney testified that, "based on past patterns and practices," he believed that the decedent had signed the will in his presence as well as in the presence of the first signing attorney and that they then had signed in the presence of each other.

45. *Id.*

46. *Id.* at 392 n. 5.

> "Although the primary purpose of succession laws is realization of the decedent's intent, statutes intercede to thwart even the dearest goals of a would-be-testator***. Naturally, the purpose of these statutes, which set forth the requirements for a valid will, is not to convert the will-writing process into a game of connect the dots. The statutory requirements are generally straightforward, and as long as the testator is careful, she [or he] should succeed in meeting these requirements."

47. *Id.* at 393.

must follow the statutory language, which specifically states that a self-executing affidavit is not sufficient when the will is contested by an interested person.[48] As the self-executing affidavit did not have a presumptive effect, the signing attorneys' testimony and the handwriting experts' affidavits created a genuine issue of material fact as to whether the statutory requirements were met. The Superior Court justice's grant of summary judgment was improper because an issue of material fact did, in fact, exist.

Another issue worth discussing is that a judge who passes on a motion for summary judgment must review the evidence from a perspective most favorable to the party opposing the motion; therefore, it would appear inconsistent to view the self-executing affidavit as "presumptive" in a summary judgment proceeding.[49] Additionally, the Superior Court justice granted summary judgment because she could not say, "with confidence," that the handwriting expert's affidavit created a genuine issue of material fact. However, on a motion for summary judgment, a justice need not determine the facts with confidence. Rather, "it is important to bear in mind that the purpose of the summary judgment procedure is issue finding, not issue determination."[50] Therefore, the Superior Court justice's grant of summary judgment was improper.

CONCLUSION

This opinion illustrates that in a probate case it is imperative to ensure that the statutory requirements are met because intent may not be presumed when a will is contested. If the validity of the will is questioned by an interested party, a self-executing affidavit is not sufficiently determinative of the validity of the execution to admit the will to probate. Further, whether a will has been executed in accordance with the statutory requirements does create a genuine issue of material fact and renders summary judgment improper.

Brittanee Bland-Masi

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48. *Id.* at 392. *See Supra* note 42.
49. *Id.* at 391. *See Supra* note 25.
50. *Id.* (citing Indus. Nat'l Bank v. Pelose, 397 A.2d 1312, 1313 (R.I. 1979))

Workers' Compensation Law. *City of Pawtucket v. Pimental*, 960 A.2d 981 (R.I. 2008). The Rhode Island Supreme Court held that a court is not precluded from determining that an injured employee has reached "maximum medical improvement" (MMI) pursuant to R.I.G.L. 1956 § 28-29-2(8) when the employee refuses to undergo a recommended surgery which may improve his injury. Additionally, the Court found that pre-trial procedures utilized by the Workers' Compensation Court, which do not require a full hearing on the issue of "maximum medical improvement," do not violate an injured employee's due process rights.

FACTS AND TRAVEL

Michael Pimental (Pimental), a sanitation engineer, suffered a herniated disk while working for the City of Pawtucket (the City).[1] The City and Pimental reached an agreement on June 20, 2001 whereby Pimental would receive "workers' compensation benefits for partial incapacity."[2] On December 6, 2001, Pimental began receiving total disability benefits for a duration of ten months while recovering from a back surgery.[3] Subsequently, on October 8, 2002, the Workers' Compensation Court reduced his benefits after it was determined that he had improved to partial disability.[4] Thereafter, Pimental had an MRI that revealed a recurrent disk herniation, indicating that the first surgery was unsuccessful.[5] Hesitant to undergo any additional surgery, Pimental sought a second opinion from Dr. Mark A. Palumbo who "recommended surgery but cautioned that 'surgical treatment would likely provide [Pimental] with only partial relief on his long term symptomology.'"[6] Pimental refused the surgery and attempted physical therapy, but ceased the treatment shortly

1. City of Pawtucket v. Pimental, 960 A.2d 981, 984 (R.I. 2008).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

thereafter because he felt it worsened his condition.[7]

Arguing that Pimental had reached MMI, the City requested that the Workers' Compensation Court review Pimental's status on January 20, 2004.[8] On August 3, 2004, a pretrial order finding that Pimental had reached MMI was entered and Pimental filed a claim for trial.[9] Pursuant to R.I. General Laws § 28-33-18(b), the City again petitioned the court for a reduction of Pimental's benefits by thirty percent on September 10, 2004.[10] The City's petition to reduce Pimental's benefits to seventy percent was granted in a pretrial order on October 7, 2004; however, the trial judge delayed the effective date of the reduction and the pretrial order until March 1, 2004. [11] Arguing that there had been no trial to determine his MMI status and that the petition was premature because the matter was not ripe, Pimental filed a motion to dismiss the City's petition to reduce his benefits on March 2, 2005.[12] On March 10, 2005, Pimental's motion was denied.[13]

On May 4, 2005, a consolidated trial on both the MMI and benefit reduction petitions was held, and the trial judge, relying on the testimony of Dr. James E. McLennan (Dr. McLennan), affirmed the pretrial orders.[14] Dr. McLennan examined Pimental in October 2002 and December 2003 on behalf of Pimental's insurer and concluded that Pimental had reached MMI because Pimental's condition had not improved.[15] Dr. McLennan, noting that Pimental was "only mildly disabled," advised that surgery, whereby the protruding disk material aggravating Pimental's nerve would be removed, might improve his condition; however, without the surgery, "it was unreasonable to expect his condition to improve."[16] Dr. McLennan concluded that, in his opinion, Pimental had reached MMI because he rejected any additional surgery.[17] At trial, Pimental testified and acknowledged that he

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 984-85.
11. *Id.* at 985.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

had decided not to have any additional surgeries because he felt the first surgery had exacerbated the injury.[18] Pimental further acknowledged that he was collecting Social Security disability benefits and had not attempted to gain employment.[19]

Affirming the holding in *Robin Rug v. Manteiga*, the Appellate Division affirmed the trial court's decision.[20] The court held that "[t]o adopt the employee's position that a surgical candidate can never be found to have reached MMI, would created a special protected class of injured workers who, by their own decisions not to have the surgery, can remove themselves from certain provisions of the Workers' Compensation Act."[21] The Appellate Division indicated that the statute clearly stated that pretrial orders are effective upon entry and that the trial judge's holding was consistent with the legislative purpose of providing timely resolutions to worker's compensation matters.[22] The Appellate Division refused Pimental's argument that the trial court erred in making an MMI determination prior to a full trial.[23] On March 19, 2007, the final decrees were entered and Pimental filed a petition for writ of certiorari, which was granted on September 20, 2007.[24]

ANALYSIS AND HOLDING

The Supreme Court of Rhode Island reviews appeals from the Appellate Division, pursuant to § 28-35-30, for errors of law or equity[25] by reviewing the record to decide if the findings made by the trial judge are supported by evidence.[26] Moreover, the Court reviews questions of statutory interpretation using the *de novo*

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18. *Id.*
19. *Id.*
20. *Id.* (citing W.C.C. No. 93-4363 (App.Div. Aug. 16, 1994)) (When an employee refuses a recommended surgical procedure, a possibility of improvement does not bar a finding of MMI.). *See also* City of Pawtucket v. Pimental, W.C.C. 04-6055, W.C.C. 04-460, at *3 (App. Div. Mar. 19, 2007).
21. *Id.* (quoting Pawtucket v. Pimental, W.C.C. 04-460, at *8).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 986 (citing Rison v. Air Filter Sys., Inc., 707 A.2d 675, 678 (R.I. 1998).
26. *Id.* (citing City of Providence v. S & J 351, Inc., 693 A.2d 665, 667 (R.I. 1997)).

standard.[27]

The "Maximum Medical Improvement" Determination

The Court determined that "allowing an employee to delay a finding of MMI by refusing to undergo a recommended treatment would frustrate the purpose of the Workers' Compensation Act."[28] "Maximum medical improvement" is statutorily defined as "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to materially improve the condition."[29] Pimental argued that because the statute does not include the word "surgery," the legislature did not intend to include surgery candidates and they are exempt from an MMI finding.[30] The City argued that the plain meaning of the statute is clear and allows MMI findings for injured employees who refuse recommended surgery.[31]

In interpreting the statute, the Court examines "the language, nature, and object of the statute."[32] The Court "must give to the words in a statute their plain and ordinary meaning, unless a contrary interpretation is apparent."[33] The Court relied upon the Appellate Division's interpretation of MMI in two similar cases where employees were injured and refused recommended surgery.[34] In those cases, the Appellate Division found that an employee should not be allowed to circumvent a finding of MMI by refusing surgery.[35] The Court found that MMI does not mean that an employee will never improve or decline, but rather MMI indicates that an employee has reached a point where no further treatment is expected to improve the condition.[36]

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27. *Id.* (citing *Rison*, 707 A.2d at 678).
28. *Id.* at 988
29. *Id.* at 986 (quoting R.I.GEN.LAWS § 28-29-2(8) (1956)).
30. *Id.*
31. *Id.*
32. *Id.* (quoting Howard Union of Teachers v. State, 478 A.2d 563, 565 (R.I. 1984)).
33. *Id.*
34. *Id.* at 986-87 (citing Providence Coll. v. Gemma, W.C.C. No. 95-1493, at *2-3 (App.Div. Aug. 19, 1996); Robin Rug v. Manteiga, W.C.C. No. 93-4363 (App.Div. Aug. 16, 1994)).
35. *Id.* at 987 (citing *Gemma*, No. 94-1493 at *3).
36. *Id.*

Noting that the reduction in benefits was not a punishment and that the General Assembly encourages partially disabled workers to return to work when they have fully recovered, the Court rejected Pimental's argument that the Appellate Division's determination forced him to choose between his physical well-being and his family's well-being.[37] The Court stated that Pimental was still receiving benefits and he was not "ensnared in the catch-22 situation that he implie[d]."[38]

Further, the Court noted that the legislature made several changes to the Workers' Compensation Act in 1992 in order to "'eliminate waste and unnecessary costs' and to 'swiftly and fairly make appropriate adjustments for employees who are capable of employment.'"[39] The Court held that allowing an injured employee to evade a finding of MMI by refusing surgery is inconsistent with the legislature's intent of deterring waste and abuse.[40]

The Validity of the Pretrial Order Reducing Benefits

The Court found that the pretrial order reducing Pimental's benefits, which was entered prior to a full trial on the issue of MMI, did not violate his due process rights.[41] The Court began its review of the constitutionality of the Workers' Compensation Court's decision by applying the three part test developed by the United State Supreme Court in *Mathews v. Eldridge*.[42] In order to determine if a pretrial procedure violates an individual's right to due process, the Court analyzes the following factors: "'(1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used and the possible value, if any, of additional or substitute procedural safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.'"[43] The Court noted that

37. *Id.*
38. *Id.* at 988.
39. *Id.* (quoting P.L. 1992, ch. 31, § 1).
40. *Id.*
41. *Id.* at 991.
42. *Id.* at 988-989 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
43. *Id.* at 989 (quoting John J. Orr & Sons, Inc. v. Waite, 479 A.2d 721,

when state action deprives an individual of benefits to which he is entitled, due process concerns arise.[44]

During the Workers' Compensation Court's pretrial process, both parties are allowed to submit medical and other evidence, have the right to be represented by counsel, and are allowed to submit written arguments in favor or opposition of any proposed orders.[45] Moreover, "[o]n the specific issue of reduction of benefits[,]" the trial judge may enter an order immediately, or he may delay the execution of the order, depending on the employee's efforts to obtain employment.[46]

The Court found that the only private interest at stake was Pimental's right to full workers' compensation benefits; however, the Court found that because the trial judge delayed the execution of the order for five months to allow Pimental sufficient time to obtain employment, "'the degree and duration of the possible deprivation [did] not rise. . .to the level of denial of due process.'"[47] Next the Court considered the value of the procedural safeguards in the MMI pretrial order by comparing the United States Supreme Court's holding in *Mathews* to that of the holding in *Goldberg v. Kelly*.[48] The Court found that MMI is based on medical evaluations, like the disability hearing in *Mathews*, not an employee's credibility, like the welfare benefits hearing in *Goldberg*, and that it would not increase the risk of erroneous decisions if oral testimony was not allowed.[49] Therefore, the Court concluded that the pretrial process in Workers' Compensation Court, which allows an employee to be represented by counsel and submit documentary evidence, is "'fair and reliable.'"[50]

723-24 (R.I. 1984) (citing *Mathews*, 424 U.S. at 335)).

44. *Id.* (citing Goldberg v. Kelly, 397 U.S. 254, 260-62 (1970).

45. *Id.*

46. *Id.* (citing § 28-35-20(c); § 28-33-18(b)).

47. *Id.* (quoting *Waite*, 479 A.2d at 725).

48. *Id.* at 990 (citing *Mathews*, 424 U.S. at 343 (using only documentary evidence for a disability assessment did not violate due process); Goldberg, 397 U.S. at 269 (written submissions were insufficient for due process rights because welfare benefits are based on matters of credibility and truthfulness)).

49. *Id.*

50. *Id* (citing John J. Orr & Sons, Inc. v. Waite, 479 A.2d 721, 725 (R.I. 1984)).

Further, the Court noted that the trial judge delayed the entry of the order for five months; therefore, the value of any other safeguard would be minimal.[51] Finally, the Court found that allowing a full hearing for MMI prior to any modification of benefits would be inconsistent with the purpose of the Workers' Compensation Act.[52] A clear goal of the Act is the "expeditious resolution of. . . disputes" and requiring additional hearings would delay disputes, creating a greater burden on Rhode Island taxpayers.[53] In considering all the factors of the three part test, the Court found that the MMI determination and the entry of the pretrial order did not violate Pimental's right to due process.[54]

COMMENTARY

This case is the Rhode Island Supreme Court's first interpretation of § 28-29-2(8).[55] The Court's interpretation is clearly aligned with the reading of the Appellate Division of the Workers' Compensation Courts and the goals of the General Assembly.[56] Relying on the reforms made to the Workers' Compensation Act in 1992, the Court finds that the actions taken by employees to avoid MMI would create unnecessary costs and lengthen the time it takes for these matters to be resolved.[57] This case illustrates the Court's dedication to applying the plain and ordinary meaning of the words of statutes. Moreover, the Court also demonstrates a commitment to the General Assembly's goal of timely resolutions of workers' compensation matters, not only for individual companies and employees involved but for the taxpayers of Rhode Island as well.

CONCLUSION

Relying on the plain meaning of § 28-29-2-(8), the Court found that an MMI determination can be made despite the fact that an employee is recommended for additional surgery and refuses it.[58]

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51. *Id.*
52. *Id.* at 990-91.
53. *Id.* at 990.
54. *Id.* at 991.
55. *See Id.* at 986.
56. *Id.* at 987.
57. *Id.* at 988.
58. *Id.*

Allowing an employee to avoid an MMI determination by refusing a recommended surgery would frustrate the purpose of the Workers' Compensation Act.[59] The purpose of Act is to promote the "expeditious resolution of workers' compensation disputes," which would be frustrated if a full trial was required to determine MMI.[60] Therefore, the Court found that because the pretrial process of the Workers' Compensation Court were fair and that allowing a full trial on MMI would frustrate the purpose of the Workers' Compensation Act, Pimental's due process rights were not violated.[61]

Staci M. Buss

59. *Id.*
60. *Id.* at 990.
61. *Id.* at 991.